85-1501

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

1985 TERM

No.

In the Matter of the Application of

CORTLANDT NURSING HOME, HIGHLAND NURSING HOME, INC., and KING STREET HOME, INC.,

Petitioners,

v.

DAVID AXELROD, M.D. as COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK; BARBARA BLUM, as COMMISSIONER OF SOCIAL SERVICES OF THE STATE OF NEW YORK; C. MARK LAWTON, as DIRECTOR OF THE BUDGET OF THE STATE OF NEW YORK; and DONALD KITCHEN, as COMMISSIONER OF SOCIAL SERVICES OF ST. LAWRENCE COUNTY,

Respondents.

CORRECTED COPY

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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March, 1986

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QUESTION PRESENTED

Whether Petitioners were denied due process of law under the Fifth and Fourteenth Amendments to the United States Constitution where New York State officials responsible for the administration of the federal Medicaid program engaged in unconscionable administrative delay of up to ten years prior to setting final reimbursement amounts and effecting recoupment of alleged Medicaid overpayments?

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IN THE

SUPREME COURT OF THE UNITED STATES

1985 TERM

In the Matter of the Application of

CORTLANDT NURSING HOME, HIGHLAND NURSING HOME, INC., and KING STREET HOME, INC.,

Petitioners,

v.

DAVID AXELROD, M.D. as COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK; BARBARA BLUM, as COMMISSIONER OF SOCIAL SERVICES OF THE STATE OF NEW YORK; C. MARK LAWTON, as DIRECTOR OF THE BUDGET OF THE STATE OF NEW YORK; and DONALD KITCHEN, as COMMISSIONER OF SOCIAL SERVICES OF ST. LAWRENCE COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

The Petitioners, Cortlandt Nursing Home, Highland Nursing Home, and King Street Home, Inc., respectfully request that a Writ of Certiorari issue to review the Order of the New York State Court of Appeals dated October 17, 1985.

That order, which reversed or substantially modified three orders of the State Supreme Court, Appellate Division, was based on a decision of the Court of Appeals declining to invalidate attempts by Respondents to recoup alleged Medicaid overpayments after an unconcionable and unexplained delay of up to ten years. Each Petitioner had commenced a separate proceeding under Article 78 of the New York State Civil Practice Law and Rules. The three proceedings were briefed and argued jointly in the court below; they present the same issues in this court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 66 N.Y.2d 169, 486 N.E.2d 785, 495 N.Y.S.2d 927 (1985), and appears in the Appendix hereto at A3[1]. The opinion of the Appellate Division, Third Department, is reported at 99 A.D.2d 105, 472 N.Y.S.2d 737 (1984), and appears in the Appendix at A29. The opinions of the Supreme Court, Albany County are not officially reported but appear in the Appendix at A42, A63 and A84.

JURISDICTION

Jurisdiction is conferred on this Court pursuant to 28 USC §1257(3). The date of the Decision and Order sought to be reviewed by this Petition is October 17, 1985. Petitioners moved for reargument and reargument was denied by the Court of Appeals on December 17, 1985 at A1.

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[1] References to Appendix are indicated by page numbers preceeded by an "A".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person...shall be deprived of life, liberty or property without due process of law...

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...nor shall any state deprive any person of life liberty or property without due process of law...

New York's State Administrative Procedure Act, §301 (1) provides:

> In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within a reasonable time.

STATEMENT OF THE CASE

Petitioners operate residential health care facilities (nursing homes) which participate in the Medicaid program, a joint federal-state program established pursuant to Title XIX of the federal Social Security Act, 42 U.S.C. §1396, *et seq,* whereby facilities are reimbursed for the care they render to sick and elderly Medicaid recipients.

Under New York law, residential health care facilities are reimbursed for the care they provide under the Medicaid program at rates established by the Respondent Commissioner of Health pursuant to New York Public Health Law, §2807 and §2808. These rates must

be approved by the Respondent Director of the Budget and then paid by local social services districts throughout the state under the jurisdiction of the Respondent Commissioner of Social Services.

Under the State's methodology for the years at issue, a facility's Medicaid reimbursement rate was established on a cost-based prospective reimbursement system which entailed the submission of an annual cost report to the Department of Health. See 10 NYCRR Part 86-2. A45, A46, A67, A68, A88.

A facility's previous cost report provided the critical data used in setting the rate for subsequent periods. The cost data and rate years at issue herein are as follows:

> The 1969 costs submitted by all the Petitioners were used to calculate the rate for the period July 1, 1970 through June 30, 1971;
>
> The 1970 cost reports were used to calculate the rate from July 1, 1971 through June 30, 1972;
>
> The 1971 cost reports were used to calculate a rate for the period July 1, 1972 through December 3, 1973;
>
> The 1972 cost reports were used to calculate a rate for the year 1974; and
>
> The 1973 cost reports were used to calculate a rate for the year 1975.

The Department preliminarily audited the reports and deducted from the costs submitted those items deemed not reimbursible under the Medicaid program. Remaining costs were trended forward to allow for inflation

between the cost reporting periods and the subsequent rate periods. The Department then reviewed the reports to set a rate some 60 days in advance of the next ensuing rate period pursuant to N.Y. Public Health Law §2807(4).

The review of cost data prior to the setting of the rates did not involve a full audit of the material supporting the cost report. Such an audit, at the State's option, could occur subsequent to the certification of the rate. Petitioners claim that principles of due process limit the time in which such an audit can be used to readjust rates paid in the past.

King Street Home

King Street Home raised issues concerning cost report years 1970-73 and rate periods from July 1, 1971 through December 31, 1975. In March of 1977, almost six years after the cost report had been submitted, the Department of Health advised King Street that the facility's 1970 annual cost report had been audited. A year later, in 1978, the Department advised King Street that its cost report for years 1971-73 had been audited. Although King Street protested the audits, the Commissioner of Health took yet another year and a half before advising it on July 21, 1980 that he was revising the Medicaid rate retroactively for the periods beginning nine years earlier, from July, 1971 through March 31, 1975.

Thereafter, for over two years and three months, the Department took no action. In May of 1982, it advised Petitioner that it would schedule a hearing. By that time, the cost reports from 1970-73 were as much as twelve years old. Five years had elapsed since the Department concluded its audit of the 1970 cost

reports, and four years had elapsed since the conclusion of its audit of the 1971-73 cost reports in April of 1978. No hearing was ever held.

Highland Nursing Home

In the case of Highland Nursing Home, the 1970-72 reports are at issue and the audit processes were concluded in December, 1976. Highland demanded a hearing in February of 1977, but the Department did not issue a Notice of Hearing until June of 1980, a gap of forty months. No hearing was ever held.

Cortlandt Nursing Home

Cortlandt Nursing Home raised disputed cost report years 1969 and 1970 affecting reimbursement for the period from July 1, 1970 through December 31, 1972. The Health Department did not conclude its audit report until March of 1976. Although Cortlandt immediately requested a hearing, the Health Department did not issue a Notice of Hearing until some three years and one month later (May, 1979). This was almost ten years after the original 1970 cost report and nine years from the 1971 cost report.[2]

OPINIONS BELOW

Petitioners filed Article 78 proceedings in 1982 to enjoin any further efforts by the named Respondents to recoup rates previously paid to the facilities or to hold burdensome administrative hearings respecting such recoupment. A44, A66, A86,

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[2] Unlike the cases of the other two facilities, a hearing was held but no determination was issued until January, 1982.

State Supreme Court, Albany County

In separate decisions dated November 2, 1982, State Supreme Court, Albany County (Torraca, J.) granted the petitions on statute of limitations grounds. Petitioners' arguments based upon the unfairness of inordinate delays caused solely by the State were not reached by the Court.

State Supreme Court, Appellate Division

The Appellate Division articulated the issue to be "whether it is reasonable to permit a ten-year delay in reaching a determination by an administrative agency which provides finality to a reimbursement rate". *Id.* at 109, 472 N.Y.S.2d at 740; A38. Since the Court believed that the operation of government could not be "trammeled" by stale litigation, the Appellate Division found the delays in each of the above proceedings to be inordinate. It therefore enjoined recoupment of any alleged overpayments.

In the Appellate Division, Supreme Court, the Respondents conceded that a "Medicaid provider must be afforded due process" when the Commissioner seeks to recoup purported overpayments. *In re Cortlandt Nursing Home v. Axelrod,* 99 A.D.2d 105, 108, 472 N.Y.S. 2d 737, 739 (1984); A37. However, in deciding the case on the basis of the State Administrative Proceedure Act, it was not necessary for the court to address the due process implications of the delay.

New York State Court of Appeals

The New York Court of Appeals reversed or substantially modified the Order of the Appellate Division with respect to each Petitioner. In doing so, the Court rejected Petitioners' claim that the long delays prevented recoupment. The court also created a four point balancing test to determine whether a delay is unreasonable. The Court weighed (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay and (4) public policy advanced by governmental regulation.

A timely motion for reargument was made by Petitioners on several grounds but the Court of Appeals denied reargument on December 17, 1985 (A1).

REASON FOR GRANTING PETITION

RESPONDENTS' DETERMINATION OF ALLEGED MEDICAID OVERPAYMENTS AND RECOUPMENT AFTER AN UNCONSCIONABLE DELAY OF UP TO TEN YEARS VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Despite the critical need for timely information concerning the resources available to care for sick and elderly Medicaid patients, the Respondents, officials responsible for administering the Medicaid system in New York, permitted an extraordinary amount of time to elapse between the alleged overpayments and the commencement of recoupment. Because this disruption

of reasonable and settled expectations in a federal program violates the federal Due Process Clause, among other laws,[1] the Petition for Certiorari to this Court should be granted to permit this Court to consider the actions of Respondents which are inconsistent with the basic principles of Due Process.

Medicaid providers have due process property rights that prevent arbitrary divestment of reimbursement rights under this program. See *Case v. Weinberger,* 523 F.2d 602, 606 (2nd Cir., 1975). Moreover, a delay in resolution of administrative proceeedings can, under some circumstances, "deprive regulated entities, their competitiors or the public of rights and economic opportunities without the due process the Constitution requires". *MCI Telecommunications Corp. v. F.C.C.,* 627 F.2d 322, 341, (D.C. Dir., 1980). Govermental agencies are not immune from the dictates of due process, and the Constitutional due process protection must be accorded within a "meaningful time" if it is to be effective. *Armstrong v. Manzo,* 380 U.S. 545, 552; 85 S.Ct. 1187, 1191; 14 L. Ed.2d 62, 66 (1965); *Orloff v. Cleland,* 708 F.2d 372, 379, (9th Cir., 1983).

Without disturbing precedent establishing a Medicaid provider's due process rights in Medicaid payments received, see *In re White Plains Nursing Home v.*

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[1] In the Courts below, Petitioners placed primary emphasis on Respondents' violation of the New York State Administrative Procedure Act §301, which requires administrative actions be taken within a reasonable time. However the due process argument is clearly preserved for this Court's review. It was also presented, among other places, in the Petition of Highland Nursing Home, Inc. (A70) and in the Petitioner's Brief to the New York Court of Appeals (pp. 32, 33). Indeed, the Appellate Division opinion acknowledges Respondents' rebuttal argument that its actions did not violate due process. *In re Cortlandt Nursing Home v. Axelrod,* 99 A.D.2d at 108, 472 N.Y.S.2d at 739; A37.

Whalen, 53 A.D2d 926, 385 N.Y.S.2d 392 (1976), *aff'd,* 42 N.Y.2d 838, 366 N.E.2d 79, 397 N.Y.S.2d 378, *cert. denied* 434 U.S. 1066 (1977), the New York Court of Appeals has nevertheless sanctioned administrative delays of up to ten years by dismissing them as mere "passage of time" (A13). However, the combination of "uncertainty and delay is inconsistent with due process of law as required by the Constitution". *Sparks Nugget, Inc. v. Scott,* 583 F. Supp. 78, 83 (D. Nev., 1984). Indeed, delay itself creates uncertaintly for those, like Petitioners, who must rely upon reasonable expectations under the program to plan for financial conditions affecting their ability to render proper health care in years to come.

Thus as held in *Potomac Electric Power Co. v. I.C.C.,* 702 F.2d 1026, 1034, (D.C. Cir., 1982):

> there must be a 'rule of reason' to govern the time limits to administrative proceedings. Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision making into future plans.

In an attempt to excuse the unconscionable and inordinate delays which were solely the fault of Respondents, the New York Court of Appeals erected a myopic four pronged test which merely seeks to determine whether the delay is unreasonable within the meaning of the State Administrative Procedure Act. Regardless of the applicability of such a standard of analysis under the State statute, that standard is superceded where, as here, the overall inordinate delay is repugnant to the Petitioners' rights under the due process provisions of the United States Constitution.

As recognized by the Appellate Division and never squarely addressed by New York State's Court of Appeals, it can hardly be said that delays up to ten years from the commencement of procedures to attempt to recoup can be deemed reasonable under any standard, constitutional or otherwise. Federal courts have denounced delays of similar length. In *Nader v. F.C.C.*, 520 F.2d 182 (D.C. Cir., 1975), the Court noted that "nine years should be enough time for any agency to decide almost any issue". *Nader,* 520 F.2d at 206. Furthermore, the Court acknowledged that there comes "a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all and the result is a denial of justice". The Court foresaw "the breakdown of the regulatory process if the public and the regulated ...[entities] must wait as long as ten years to have important issues decided." *Nader,* 520 F.2d at 207.

Respondents seek recoupment of alleged Medicaid overpayments which, in some cases were paid based on costs incurred as early as 1969. Although the Due Process Clause may not protect providers from reasonable delays in the administration of the Medicaid system, due process would be a hollow phrase indeed if Respondents were granted an unlimited amount of time to proceed against alleged overpayments.

The prejudice to the regulated, of course, is obvious. Any attempt to plan for future events is impossible in light of uncertainty caused by the State's inaction. Even the New York Court of Appeals has recognized that the "providers of service as well [as the State] would be benefited by prompt resolution of controversies with respect to final reimbursement right determinations". *Solnick v. Whalen,* 49 N.Y.2d 224, 232, 401 N.E.2d 190, 425 N.Y.S.2d 68 (1980). Since finality

in reimbursement rates is essential to enable facilities to predict future revenue, budget and contain their costs accordingly, it would appear that the Due Process Clause of the federal Constitution bars the State from forcing providers to operate under the cloud of retroactive review and adjustment for more than a decade. Such practices make a shambles of facilities reasonable and well settled expectations under the Mecicaid program.

Instead, the prejudice occasioned by the inordinate delay, caused soley by the State, must not be left unremedied. Otherwise, state agencies will have no incentive to proceed in a timely fashion and could hold regulated entities hostage in perpetuity to the fear of Medicaid payment readjustment.

"[T]here comes a time when the hour glass runs out and even a public agency must 'fish or cut bait' ". *British Airways Board v. Port Authority of New York and New Jersey,* 564 F.2d 1002, 1014 (2d Cir., 1977) (concurring opinion of Judge Mansfield). If due process is to have any meaning in the State of New York for both the health care facilities and the elderly and physically handicapped Medicaid patients who rely on such services, the State of New York should not be permitted to engage in unconscionable neglect of administrative duties.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Order of New York State Court of Appeals
Denying Reargument

COURT OF APPEALS DECISION LIST
December 17, 1985

Motions

3 Mo. No. 1175
In the Matter of
Cortlandt Nursing
Home,

Respondent

vs.

David Axelrod, M.D.,
as Commissioner of
Health of the State
of New York, et al.,

Appellants.

And two additional
proceedings: Mtr. of
Highland Nursing
Home, Inc.
Mtr. of King Street
Home Inc.

———————————

In the Matter of
Broadacres Skilled
Nursing Facility,

Respondent

vs.

David Axelrod, M.D.,
as Commissioner of
Health of the State
of New York, et al.,

Appellants.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.
Chief Judge Watchler took no part.

Order of New York State Court of Apeals Reversing and Modifying the Order of the New York State Appellate Division which Granted Petitions

The Hon. Sol Wachtler, Chief Judge, Presiding

3 No. 397
In the Matter of Cortlandt
Nursing Home,

Respondent,

v.

David Axelrod, M.D., as Commissioner of Health of the State of New York, et al.,

Appellants.

---

and two additional proceedings:
Mtr of Highland Nursing Home, Inc.
Mtr of King Street Home Inc.

The appellants in the above entitled appeal appeared by Hon. Robert Abrams, Attorney General;
the respondent appeared by O'Connell and Aronowitz, P.C.

The Court, after due deliberation, orders and adjudges,

Matter of Cortlandt Nursing Home v. Axelrod: Order reversed, with costs, proceeding converted to an action for declaratory judgment and judgment granted declaring that appellants are not precluded from seeking recoupment of Medicaid overpayments made to petitioner. Opinion by Judge Jasen, Judges Meyer, Simons, Kaye, Alexander and Titone concur, Chief Judge Wachtler took no part.

Matter of Highland Nursing Home, Inc. & Matter of King Street Home, Inc.: Orders modified, with costs to appellants, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Jasen. Judges Meyer, Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court
Court of Appeals, Clerk's Office, Albany, October 17, 1985

Decision of New York State Court of Appeals

State of New York
Court of Appeals

3 No. 397
In the Mattter of Cortlandt
Nursing Home,

Respondent,

v.

David Axelrod, M.C., as Commissioner of Health of the State of New York, et al.,

Appellants.

---

and two additional proceedings:
Mtr of Highland Nursing Home, Inc.
Mtr of King Street Home Inc.

4 No. 398

In the Matter of Broadacres Skilled Nursing Facility,

Respondent,

v.

David Axelrod, M.D., as Commissioner of Health of the State of New York, et al.,

Appellants.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(397) Robert Abrams, Attorney General (Clifford A. Royeal, Robert Hermann, & Peter H. Schiff of counsel) for appellant.

Cornelius D. Murray, Thomas F. Gleason, & Salvatore D. Ferlazzo, Albany, for respondent.

(398) Robert Abrams, Attorney General (Clifford A. Royael, Robert Hermann, & Peter H. Schiff of counsel) for appellant.

Cornelius D. Murray & Thomas F. Gleason, Albany, for respondent.

JASEN, J.:

The critical issue common to these appeals is whether administrative delay in adjudicating the final rate of Medicaid reimbursement violated the directive of the State Administrative Procedure Act that hearings be conducted within a reasonable time.

Petitioners are residential health care facilities licensed by the Commissioner of Health pursuant to Article 28 of the Public Health Law. At the times relevant to these proceedings, petitioners participated in the joint federal-state Medicaid program. (Title XIX, Social Security Act, 42 USC §1396 et seq.; New York Social Services Law § 363 et seq.) The facilities were compensated for services provided to eligible Medicaid recipients by local Social Services districts, at rates established by the Commissioner of Health and approved by the Director of the Budget. The rate-making methodology of the Department of Health[1], a cost-based prospective reimbursement system, required each facility to submit an annual report of actual costs to the Department of Health. The reported costs for the base period were audited by the Department to determine which costs were allowable under Department regulations. The allowable reported costs, adjusted to account for inflation, were then used to establish a facility's rate for the following rate year.

Upon completion of the audit, each residential health care facility is afforded a closing conference, at which time the facility may produce additional documentation in support of its stated position. (10 NYCRR § 86-2.7[e].) A facility may intitate a bureau review of the audit to challenge specific items of the audit report. (10 NYCRR 86-2.7[e].) Within 30 days of receipt of the determination of the bureau review, a facility may initiate a hearing to refute those items of the audit report adverse to the interests of the residential health care facility. (10 NYCRR 86-2.7[b].)

[1] The rates of reimbursement are established pursuant to regulations promulgated by the New York State Hospital Review and Planning Council and approved by the Commissioner of Health. (Public Health Law § 2803 [2].) The Department's rate-making methodology was formerly embodied in Part 86 of 10 NYCRR, and today is embodied in Subpart 86-2 of 10 NYCRR.

CORTLANDT NURSING HOME

The Cortlandt Nursing Home (Cortlandt) filed cost reports with the Department of Health (Department) for the years 1969 and 1970, which, respectively, were used to calculate the facility's Medicaid reimbursement rates for the periods of July 1, 1970 through June 30, 1971, and July 1, 1971 through June 30, 1972. On or about March 30, 1976, the Department advised Cortlandt that it had completed the audit of its 1969 and 1970 reported costs and that based upon the audit, it was disallowing certain expenses that the facility had claimed during 1969 and 1970, and for which Cortlandt had been reimbursed for rate period ending June 30, 1972. Cortlandt thereafter administratively appealed the Department's determination, and the Department issued a notice of hearing on May 1, 1979. The administrative hearing was commenced on June 25, 1979, and continued intermittently through July 1, 1980. The administrative law judge issued his report on August 28, 1981, and the Commissioner of Health issued his order on January 26, 1982. The Commissioner's order upheld many of the disallowances set forth in the audit, and directed that a Medicaid rate be promulgated for the facility reflecting the retroactive adjustments set forth therein.

Cortlandt then commenced this Article 78 proceeding seeking a judgment declaring the order of the Commissioner of Health dated January 26, 1982 null and void and prohibiting respondents from recouping or attempting to recoup overpayments established by the Commissioner's order of January 26, 1982. The gravamen of Cortlandt's petition was that respondents' efforts to recoup Medicaid overpayments were time-barred under the doctrine of laches and the statute of limitations. Supreme Court, Albany County, granted Cortlandt's

petition and permanently enjoined respondents from undertaking any further action to recover Medicaid overpayments. The Appellate Division, Third Department, modified the judgment of the Supreme Court by reversing the determination declaring the actions of respondents illegal, but affirmed the permanent injunction against any recoupment of Medicaid overpayments. This court granted leave to appeal.

HIGHLAND NURSING HOME

The Highland Nursing Home (Highland) filed cost reports with the Department for the years 1970, 1971 and 1972, which were utilized to calculate its Medicaid reimbursement rate for the periods beginning July 1, 1972 and ending December 31, 1974. On or about June 2, 1976, the Department advised Highland that it had completed an audit of its 1970, 1971 and 1972 reported costs and that based upon the audit, adjustments would be made in the facility's Medicaid reimbursement rates for the periods beginning July 1, 1972 and ending December 31, 1974. Thereafter, Highland initiated an Article 78 proceeding to enjoin any attempted retroactive revision in rates without affording the facility a hearing. Supreme Court, Albany County, on March 9, 1977, enjoined any recoupment without a hearing. The Appellate Division, Third Department, modified the judgment of Supreme Court on November 2, 1978 and ordered the matter to be remanded to the Commissioner of Health for the purpose of affording Highland a full administrative hearing. (*Portnick v. Whalen*, 65 AD2d 827).

The Commissioner of Health mailed a notice of hearing to Highland in June of 1980. Although no hearing has been held, it has been noted by

respondents (Verified Answer, para 13), and has not been rebutted by petitioners, that any failure to conduct a hearing in accordance with the order of the Appellate Division has been upon the mutual consent of the involved parties. On or about January 25, 1982, Highland was advised by respondent, Commissioner of Social Services of St. Lawrence County, that recoupment of Medicaid overpayments, a sum of $83,319.35, would be commenced. Contending that recoupment would be time-barred, Highland commenced this Article 78 proceeding to prevent respondents from effectuating recoupment of Medicaid overpayments as proposed in the January 25, 1982 letter of respondent. Supreme Court, Albany County, granted Highland's petition, thus enjoining recoupment. This judgment was modified by the Appellate Division, Third Department, by reversing so much of Supreme Court's judgment as held respondents' actions illegal, and affirmed the permanent injunction upon recoupment by respondents of Medicaid overpayments. Leave to appeal was granted by this court.

KING STREET HOME

The King Street Home (King Street) filed cost reports with the Department for the years 1970, 1971, 1972 and 1973, which were used, respectively, to calculate King Street's Medicaid reimbursement rates for the periods July 1, 1971 through June 30, 1972, July 1, 1972 through December 31, 1973, and the calendar years 1974 and 1975. Thereafter, the Department completed an audit of the foregoing cost reports and determined that certain reported expenses should be disallowed. By letter dated March 21, 1977, King Street received an audit report and revised rate computation sheet relating to its 1970 cost reports. By letter dated April 19, 1978, King Street received another

audit report and revised rate computations sheet relating to its 1971, 1972 and 1973 cost reports. King Street requested a bureau review (10 NYCRR § 86-2.7[e]), and was notified by the Department of the results of the review by letter dated January 21, 1980. Thereafter, the King Street facility requested an administrative hearing (10 NYCRR § 86-2.7[f]). On or about May 4, 1982, the Department served a notice of hearing upon King Street, scheduling a hearing to commence on June 2, 1982 to address whether the Department correctly disallowed certain expenses in its audit. King Street, asserting that recoupment was barred under the doctrine of laches and the statute of limitations, commenced this Article 78 proceeding to preclude respondents from recouping Medicaid overpayments. As in the *Cortlandt* and *Highland* proceedings, Supreme Court, Albany County, granted King Street's petition, the Appellate Division, Third Department, modified the judgment of Supreme Court, yet upheld the permanent injunction, and leave to appeal was granted by this court.

BROADACRES SKILLED NURSING FACILITY

The Broadacres Skilled Nursing Facility (Broadacres) filed cost reports with the Department for the years of 1971, 1972, 1973 and 1974, which, respectively, were used to calculate the facility's Medicaid reimbursement rates for the periods July 1, 1972 through December 31, 1973, the calendar year 1974, the calendar year 1975, and January 1, 1976 through March 31, 1977. In 1981, the Department advised Broadacres that it had completed the audit of the facility's reported costs for the years 1971-1974, and that based upon the audit, it was disallowing certain reported costs. Broadacres requested a bureau review to assess the audit findings. By letter dated September 9, 1981, the

Department informed Broadacres of the results of the bureau review and the rate adjustments for the period July 1, 1972 through December 31, 1977. Broadacres then requested an administrative hearing, and on or about September 16, 1982, the Department served a notice of hearing upon Broadacres, scheduling a hearing for October 28, 1982. By mutual consent of the parties, the hearing was adjourned until December 16, 1982, and again adjourned until February 1983.

On or about January 24, 1983, Broadacres commenced this Article 78 proceeding in Supreme Court, Oneida County, seeking, *inter alia*, a judgment preventing retroactive adjustment of its Medicaid reimbursement rates, and preventing the Department from recouping past overpayments. Supreme Court, by judgment entered May 11, 1983, granted Broadacres' petition and enjoined the retroactive adjustment of rates. Upon reargument, Supreme Court adhered to its original determination denying the motion to dismiss the petition. By order dated November 7, 1984, the Appellate Division, Fourth Department, adopted the reasoning of *Matter of Cortland v Axelrod* (99 AD2d 106) and unanimously affirmed the order of Supreme Court. The Appellate Division, thereafter, certified the following question to this court: "Was the order of this court entered November 7, 1984 properly made?"

For the reasons that follow, we now reverse the order of the Appellate Division, Third Department, relating to the proceeding in *Cortlandt*, modify the orders of the Appellate Division, Third Department, relating to the proceedings in *Highland* and *King Street*, and we affirm the order of the Appellate Division, Fourth Department, entered in the *Broadacres* prodeeding and answer the certified question in the affirmative.

After years of study, the State Administrative Proceedure Act was adopted in 1975 to guarantee that the actions of administrative agencies conform to uniform, sound and equitable standards. (State Administrative Procedure Act § 100, L 1975, ch 167; Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon Its Structure and Legislative History,* 26 Buffalo L Rev 589.) Section 301(1) of the State Administrative Procedure Act provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time". This section places an affirmative duty upon the State to conduct adjudicatory proceedings within "reasonable time", thus abrogating the common law view that laches may not be interposed as a defense against the State when acting in a governmental capacity and the public interest.[2] The Third and Fourth Departments, construing this statute in the context of the instant appeals, have held that a 10-year delay in reaching a final rate determination by an administrative agency is unreasonable as a matter of law, and the Department of Health should be permanently enjoined from recoupment of Medicaid overpayments. This view should be

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[2] It is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest. (*People v Van Rensselaer,* 8 Barb 189, 197; *Levey v Catherwood,* 33 AD2d 1066, 1067 [Cooke, J.]; *New York State Water Resources Comm. v Liberman,* 37 AD2d 484, app dsmd 30 NY2d 516; *Utah Power & Light Co. v United States,* 243 US 389, 409; *United States v Kirkpatrick,* 9 Wheat. 720, 735 [Story, J.]. Utilization of laches, based upon an administrative agency's delay, is precluded in a majority of jurisdictions. (Goldman, *Administrative Delay and Judicial Relief,* 66 Mich L Rev 1423, 1444, n.50; *Precious Metals Associates, Inc. v CFTC,* 620 F2d 900, 909-910.) This view stems from Considerations of sovereign immunity, protection of the public fisc and separation of powers. (*Daleview Nursing Home v Axelrod,* 62 NY2d 30, 34.) The defense of laches, specifically interposed by Cortlandt and King Street in their verified petitions to enjoin recoupment of Medicaid overpayments, is unavailing.

rejected. The passage of time, standing alone, does not, under the circumstances presented by these appeals, serve as a basis for judicial intervention, with peremptory effect, into the administrative process. (*Sarkisian Bros v. State Div. of Human Rights,* 48 NY2d 816, 818; *Heckler v. Day,* —US—, 104 S. Ct 2249; *INS v. Miranda,* 459 US 14, 18.) In determining whether a period of delay is reasonable within the meaning of State Administrative Procedure Act section 301(1), an administrative body in the first instance, and the judiciary sitting in review, must weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation.

To analyze the nature of petitioners' right to retain possession of Medicaid overpayments, it is first necessary to review the regulatory conditions under which such payments were made by the State and accepted by petitioners. Pursuant to regulations governing the audit of residential health care facilities receiving State reimbursement for costs incurred, petitioners are charged with the knowledge that any rate of payment will be construed to represent a provisional rate until an audit is performed and completed[3] and that the required fiscal and statistical reports filed with the

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[3] 10 NYCRR section 86-2.7(a) provides:

"All fiscal and statistical records and reports shall be subject to audit. All underlying books, record and documentation which formed the basis for the fiscal and statistical reports, filed by the residential health care facility with the department, shall be kept and maintained by the facility for a period of time not less than six years from the date of filing, or the date upon which the

Department are subject to audit for a period of six years from the date of their filing.[4] It is undisputed that the Department conducted the audits of petitioners' reported costs within the six year provision of limitations. (10 NYCRR § 86-2.7.)

This is not a case in which petitioners have lost any legal right, either vested or contingent. (See *Heckler v. Community Health Services of Crawford,* — US —, 104 S Ct 2218, 2225.) Petitioners knew, or should have known, that any payment certified by the Department was wholly inchoate until such time as the audit of cost reports, upon which the reimbursement rates were based, was performed and completed. The interest sought to be protected by the instant proceedings is the retention of public monies which petitioners never should have received in the first place. (*Heckler v. Community Health Services of Crawford, supra.*) Recognizing that the cost reports were subject to audit within six years from the filing date or date

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[Footnote Continued]

fiscal and statistical records were to be filed, whichever is the later date. In this respect, *any rate of payment certified by the State Commissioner of Health based on the initial submission of base year data and reports will be construed to represent a provisional rate until such audit is performed and completed* at which time such rate or adjusted rate will be construed to represent the audited rate."
(Emphasis added.)

[4]10 NYCRR section 86-2.7(c) provides:

"The required fiscal and statistical reports shall be subject to audit for a period of six years from the date of their filing with the department or from the date when due, whichever is later. This limitation shall not apply to situations in which fraud may be involved or where the provider or an agent thereof prevents or obstructs the commissioner from performing an audit pursuant to this section."

due, and were, in fact, so audited, the nature of petitioners' right to initial overpayments is provisional, not proprietary.

Concomitant with the fact that petitioners had no entitlement to Medicaid payments until audits were performed and completed, petitioners had no right to a full administrative hearing until subsequent to the audit, or the bureau review, if requested. State Administrative Procedure Act section 301(1) requires an agency to commence a hearing within reasonable time of the date of the commencement of the adjudicatory proceeding. Under governing regulation, the onus was upon *petitioners* to request an administrative hearing. (10 NYCRR 86-2.7[b].) Thus, the relevant inquiry, when considering the reasonableness of the administrative delay in question, focuses upon the period between the date the hearing was requested and the date the hearing was conducted or scheduled.

In *Cortlandt,* the Department issued the audit on March 30, 1976, and, shortly thereafter, Cortlandt requested a hearing which was commenced on May 1, 1979. The properly computed period of administrative delay was approximately three years. In *Highland,* the Department issued the audit on June 2, 1976, and, shortly thereafter, without requesting a hearing before the Department, Highland initiated an Article 78 proceeding. The Appellate Division, Third Department, (*sub nom Portnick v. Whalen,* 65 AD2d 827), remanded the matter for a hearing and, accordingly, a notice of hearing was issued by the Department in June 1980. No hearing has been held upon mutual consent of the parties. Since a hearing was not requested prior to initiating the Article 78 proceeding, there was no cognizable administrative delay. In *King Street,* the audit was issued on March 21, 1977, the bureau

review results were issued on January 21, 1980, and the administrative hearing scheduled for June 2, 1982. Prior to the scheduled hearing date, King Street commenced this proceeding. The approximate period of delay in scheduling a hearing was two and one-half years. In *Broadacres,* the audit was issued in 1981, the bureau review findings were issued on September 9, 1981, and administrative hearing scheduled for October 28, 1982. No hearing has been concluded, by mutual consent of the parties. The approximate period of administrative delay was one year. Neither petitioners' assertion that the delay at issue is twelve years (Brief for petitioners Cortlandt, Highland and King Street, at p.9) nor the Appellate Division's view that the administrative delay has been ten years (*Matter of Cortlandt v. Axelrod,* 99 AD2d 105, 109) comports with the record.

Preliminarily, it should be noted that, absent extraordinary circumstances a court may not intervene in an administrative proceeding, for reason of adjudicatory delay, until a hearing has been held and an official order rendered. (Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings,* 72 Yale L J 574, 577-578.) It is within the province of the administrative agency, in the first instance, to determine upon a plenary hearing the cause of the delay, the interests implicated in the proceeding, and whether substantial prejudice to the facility has resulted from the administrative delay, (*Goodman & Co. v. New York Tel. Co.,* 309 NY 258, 267.) Judicial intervention prior to the rendition of a final administrative order is contra-indicated by considerations of separation of powers (O'Brien, D.M., *APA and the Judiciary,* 7 Harv. Jour. of Law and Pub. Pol. 443) and ripeness (*New York State Inspection, Security and Law Enforcement Employees v.*

Cuomo, 64 NY2d 233, 240; Siegel, NYS Law Digest, No. 305, May 1985, pp 1-2). There can be no determination by this Court as to the reasonableness of the administrative delay in *Highland* and *King Street*, wherein no hearing has been conducted and we are limited to granting mandamus to compel hearings. In *Broadacres*, we are even further limited by the certified question to a determination whether an Article 78 proceeding lies. *Cortlandt* has proceeded to a final administrative determination and we are thereby empowered to determine the reasonableness of the administrative delay.

In determining whether the period of administrative delay of approximately three years in *Cortlandt* was reasonable within the meaning of State Administrative Procedure Act section 301(1), certain factors, in addition to the nature of petitioners' interests, must be considered. Critical to an assessment of the reasonableness of administrative delay is whether the private party has incurred substantial prejudice by reason of the delay. Where administrative delay has significantly and irreparably handicapped a private party in mounting a defense in an adversary administrative proceeding, the agency, or court reviewing a final administrative order, is authorized to dismiss the proceeding. (See *Occidental Life Ins. Co. v. EEOC*, 432 US 355, 373; *EEOC v. Liberty Loan Corp.*, 584 F2d 853, 854-857 [8th Cir. 1978]; Goldman, *Administrative Delay and Judicial Relief*, 66 Mich L Rev 1423, 1453-1454.)

Cortlandt asserts that prejudice from the delay is obvious, and that there comes a point where the extent of the delay speaks for itself and becomes intolerable. Petitioner further suggests, in conclusory form, that the lapse of time hinders witneses' ability to recall facts and that recoupment or adjustment threatens the operational and financial viability of the facility. Petitioner does not demonstrate the manner by which administrative delay handicapped its defense efforts at the administrative hearing. Moreover, petitioner does not contend that the administrative delay precluded expansion of services or caused curtailment of existing services.[5] Where a facility operates on a *provisional* rate of reimbursement which may reflect an unliquidated financial liability, it is aware of the risk of recoupment or adjustment.

The causal relationship between the conduct of the agency and administrative delay is another critical factor to be considered in determining whether said delay was unreasonable under the circumstances. A court should be extremely reluctant to hold agency inaction unreasonable where the delay is attributable to a lack of resources. (Note, *Judicial Acceleration of the Administrative Process: The Right to Relief From Unduly Protracted Proceedings,* 72 Yale L J 574, 584; Kaufman, *Judicial Review of Agency Action,* 45 NYU L Rev 201, 207.) Also, administrative delay may be justifiable when its source lies in the complexity of the issues to be resolved or in the time consuming nature of the remedy. (Goldman, *Administrative Delay and*

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[5] Compare *Matter of Utica Cheese v Barber,* (49 NY2d 1028), wherein the administrative delay of the Commissioner of the Department of Agriculture and Markets, in acting upon an application for a milk dealer's license, precluded petitioner from engaging in economic activity.

Judicial Review, 66 Mich L Rev 1423, 1449.) Where, however, agency proceedings are demonstrated to be repetitive, purposeless and oppressive (*Deering Milliken, Inc. v. Johnston,* 295 F2d 856, 868 [4th Cir], or where delay obtains by reason of an agency's departure from its governing procedural regulations (see *In Re Larsen,* 17 N.J. Super 564, 577 [Brennan, J., concurring]), the administrative process may be stripped of the presumption of regularity. In considering the conduct of the Department in *Cortlandt,* we cannot say, on the record before us, that the administrative delay was unreasonable.

It must further be determined whether the conduct of the private party involved in the adjudicatory proceeding was responsible, in whole or in part, for the administrative delay. (Goldman, *Administrative Delay and Judicial Review,* 66 Mich L Rev 1423, 1449-1450.) It does not appear upon this record that the Cortlandt facility caused administration delay; however, Highland, King Street and Broadacres may well be found to be responsible, at least in part, for the administrative delay. Although hearing dates were scheduled in *Highland, King Street* and *Broadacres,* the opportunity for a hearing was waived, and said petitioners opted for judicial relief. The responsibility for delay occasioned by resort to the judicial process, where the agency was prepared to adjudicate petitioners' claims, rests with petitioners. Indeed, in *Highland,* petitioner immediately sought judicial redress without even requesting an administrative hearing. In *Broadacres,* as well as *Highland,* the lack of a final administrative adjudication resulted by mutual consent of the parties. The apportionment of responsibility for the delay, however, is properly a function of the administrative agency, upon a plenary hearing, and should not be resolved by the courts in the first instance.

Also to be considered is whether an important interest, implicating matters of broad public concern, underlies governmental regulation or action. (*INS v. Miranda*, 459 US 14, 19, *supra;* Goldman, *Administrative Delay and Judicial Review*, 66 Mich L Rev 1423, 1452-1453, *supra.)* There exists a strong, defined public policy of this State to recover public funds improperly received. (*Matter of Daleview Nursing Home v. Alexrod*, 62 NY2d 30, *supra; People v Journal Co.*, 213 NY 1, 8; Executive Law § 63-c[1].) The public policy underlying recoupment of Medicaid overpayments, or adjustment of rates based upon past overpayments, must be balanced in conjunction with the nature of the right sought to be protected, prejudice to petitioners, and cause of administrative delay, when assessing whether administrative delay is reasonable. We conclude that in *Cortlandt*, the important public policy of recovering public funds wrongfully received is directly implicated.

As the foregoing discussion has established, petitioners have not demonstrated a clear legal right to retain Medicaid overpayments. Moreover, administrative delay may not be said to deprive the agency of jurisdiction. (*Matter of Geary v. Comm. of Motor Vehicles*, 59 NY2d 950; *Matter of Sarkisian Bros. v. State Div. of Human Rights*, 48 NY2d 816, 818, *supra.*) Thus, petitioners' Article 78 proceedings, in the nature of prohibition, do not lie. (*Matter of Schumer v. Holtzman*, 60 NY2d 46, 51; Cooper, State Administrative Law, pp 659-662.) Accordingly, in *Cortlandt* the proceeding should be converted to an action for declaratory judgment (CPLR § 103[c]; Siegel, New York Practice, § 563), and the remaining matters should be treated as proceedings in the nature of mandamus.

The *Cortlandt* proceeding, wherein an administrative hearing has been conducted and a final order rendered, should be converted to an action for declaratory judgment. Inasmuch as Cortlandt's interest in the Medicaid overpayments was provisional in nature, Cortlandt had not demonstrated substantial prejudice resulting from the delay in the scheduling of a hearing, and an important public policy underlies the governmental action at issue, the administrative delay of three years was not unreasonable under State Administrative Procedure Act section 301.(1). The proceedings in *Highland* and *King Street,* wherein administrative hearings have not been concluded, should be treated as proceedings in the nature of mandamus (Cooper, State Administrative Procedure Law, pp 656-657; Jaffe, III Judicial Control of Administrative Action, p 176) to compel the Department to conduct a hearing in accordance with governing regulations (10 NYCRR § 86-2.7 *et seq.*). In *Broadacres,* the order affirming the dismissal of a motion to dismiss the petition should be affirmed and the question certified answered in the affirmative inasmuch as the Article 78 proceeding in the nature of mandamus lies.

Accordingly, in *Matter of Cortlandt,* the order of the Appellate Division should be reversed, with costs, the proceeding converted to an action for declaratory judgment and judgment granted declaring that appellants are not precluded from seeking recoupment of Medicaid overpayments made to petitioner. In *Matter of Highland* and *Matter of King Street,* the orders of the Appellate Division should be modified, with costs to appellants, by directing respondents to hold hearings in accordance with this opinion and, as so modified, affirmed. In *Matter of Broadacres,* the order of the Appellate Division should be affirmed, with costs, and the question certified answered in the affirmative.

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Case #397 - M/O Cortlandt Nursing Home v. Axelrod:

Order reversed, with costs, proceeding converted to an action for declaratory judgment and judgment granted declaring that appellants are not precluded from seeking recoupment of Medicaid overpayments made to petitioner. Opinion by Judge Jasen. Judges Meyer, Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler took no part.

Matter of Highland Nursing Home, Inc.
Matter of King Street Home Inc.:

Orders modified, with costs to appellants, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Jasen. Judges Meyer, Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler took no part.

Case #398 - M/O Broadacres Skilled Nursing Facility:
Order Affirmed, with costs, and question certified answered in the affirmative. Opinion by Judge Jasen. Judges Meyer, Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler took no part.

Decided October 17, 1985

Order of Appellate Division,
Third Department

ORDER
45264
ALBANY COUNTY
CLERK'S INDEX
NO. 988-83

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 12th day of December, 1983.

Present: Hon. A. Franklin Mahoney,

Presiding Justice.

Hon. T. Paul Kane,
Hon. John T. Casey,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,

Associate Justices.

STATE OF NEW YORK SUPREME COURT — APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of the Application of
CORTLANDT NURSING HOME,

Petitioner-Respondent,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents-Appellants.

The Respondents-Appellants having appealed from a Judgement of the Supreme Court, Albany County, at Special Term (Torraca, J.) entered on January 19, 1983, in the Albany County Clerk's office, which granted Petitioner's application, in a proceeding pursuant to CPLR Article 78, for a Judgment enjoining Respondents, their agents and/or successors in office from recouping or attempting to recoup in any manner whatsoever the alleged overpayments for medicaid reimbursement for rate periods ending or or before December 31, 1975, and said appeal having been presented during the above stated term of this Court and having been argued by the Hon. Robert Abrams (Clifford A. Royeal, Esq., of Counsel) for Petitioner-Respondent, and; after due deliberation, the Court having rendered a decision on the 2nd day of February, 1984, it is hereby

ORDERED, that the Judgement is modified, on the law, by reversing so much thereof as granted that portion of the Petition seeking a declaration that the actions taken by Respondents were illegal, and as so modified, affirmed without costs.

ENTER:

/s/ Michael J. Novack
Clerk

DATED AND ENTERED: April 23, 1984

A TRUE COPY
Michael J. Novack
CLERK

Exhibit "C"

Order of Appellate Division,
Third Department

ORDER
45266
ALBANY COUNTY
CLERK'S INDEX
NO. 989-83

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 12th day of December, 1983.

Present: Hon. A. Franklin Mahoney,

Presiding Justice.

Hon. T. Paul Kane,
Hon. John T. Casey,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,

Associate Justices.

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

In the Matter of the Application of
HIGHLAND NURSING HOME, INC.,

Petitioner-Respondent,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents-Appellants

The Respondents-Appellants having appealed from a Judgment of the Supreme Court, Albany County at Special Term (Torraca, J.) entered on January 19, 1983, in the Albany County Clerk's office, which granted Petitioner's application, in a proceeding pursuant to CPLR Article 78, for a Judgment enjoining Respondents, their agents and/or successors in office from recouping or attempting to recoup in any manner whatsoever the alleged overpayments for medicaid reimbursement for rate periods ending on or before December 31, 1974, and said appeal having been presented during the above stated term of this Court and having been argued by the Honorable Robert Abrams (Clifford A. Royael, Esq., of Counsel) for Respondents-Appellants and by O'Connell and Aronowitz, P.C. (Cornelius D. Murray, Esq., of Counsel) for Petitioner-Respondent, and after due deliberation, the Court having rendered a decision on the 2nd day of February, 1984, it is hereby

ORDERED, that the Judgment is modified, on the law, by reversing so much thereof as granted that portion of the Petition seeking a declaration that the actions taken by Respondents were illegal, and as so modified, affirmed, without costs.

ENTER:

Michael J. Novack

Clerk

DATED AND ENTERED: APRIL 23, 1984

A TRUE COPY
Michael J. Novack
CLERK

Order of Appellate Division,
Third Department

ORDER
45265
ALBANY COUNTY
CLERK'S INDEX
NO. 990-83

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building, in the City of Albany, New York, commencing on the 12th day of December, 1983.

Present: Hon. A. Franklin Mahoney,

Presiding Justice.

Hon. T. Paul Kane,
Hon. John T. Casey,
Hon. Leonard A. Weiss,
Hon. Howard A. Levine,

Associate Justices.

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

In the Matter of the Application of
KING STREET HOME, INC.,

Petitioner-Respondent,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State Of New York,

Respondents-Appellants

The Respondents-Appellants having appealed from a Judgment of the Supreme Court, Albany County at Special Term (Torraca, J.) entered on January 19, 1983, in the Albany County Clerk's office, which granted Petitioner's application, in a proceeding pursuant to CPLR Article 78, for a Judgement enjoining Respondents, their agents and/or successors in office from recouping or attempting to recoup in any manner whatsoever the alleged overpayments for medicaid reimbursement for rate periods ending on or before December 31, 1975, and said appeal having been presented during the above stated term of this Court and having been argued by the Honorable Robert Abrams (Clifford A. Royael, Esq., of Counsel) for Respondents-Appellants and by O'Connell and Aronowitz, P.C. (Cornelius D. Murray, Esq., of Counsel) for Petitioner-Respondent, and after due deliberation, the Court having rendered a decision on the 2nd day of February, 1984, it is hereby

ORDERED, that the Judgment is modified, on the law, by reversing so much thereof as granted that portion of the Petition seeking a declaration that the actions taken by Respondents were illegal, and as so modified, affirmed without costs.

ENTER:

/s/ Michael J. Novark

Clerk

DATED AND ENTERED: April 23, 1984

A TRUE COPY
Michael J. Novark
CLERK

Decision of New York State Appellate Division

Supreme Court—Appellate Division
Third Judicial Department

February 2, 1984

45264
45265
45266

In the Matter of CORTLANDT NURSING HOME,

Respondent,

v

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants.

(Proceeding No. 1.)

In the Matter of KING STREET HOME, INC.,

Respondent,

v

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants.

(Proceeding No. 2.)

In the Matter of HIGHLAND NURSING HOME, INC.,

Respondent,

v

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants,

et al., Respondent.
(Proceeding No. 3.)

Judgements modified, on the law, by reversing so much thereof as granted those portions of the petitions seeking a declaration that the actions taken by respondents were illegal, and as so modified, affirmed, without costs.

Opinion per WEISS, J.

MAHONEY, P.J., KANE, CASEY and LEVINE, JJ., concur.

45264
45265
45266

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

In the Matter of CORTLANDT NURSING HOME,

Respondent,

-against-

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants.

(Proceeding No. 1.)

In the Matter of KING STREET HOME, INC.,

Respondent,

-against-

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants.

(Proceeding No. 2.)

In the Matter of HIGHLAND NURSING HOME, INC.,

Respondent,

-against-

DAVID AXELROD, as Commissioner of Health of the State of New York, et al.,

Appellants,

et al., Respondent.
(Proceeding No. 3.)

Argued, December 16, 1983.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. T. PAUL KANE,
HON. JOHN T. CASEY,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

APPEALS from three judgments of the Supreme Court at Special Term (Joseph P. Torraca, J.), entered January 19, 1983 in Albany County, which granted petitioners' applications, in proceedings pursuant to CPLR article 78, to annul certain retroactive Medicaid reimbursement rate determinations of the State Commissioner of Health and for a permanent injunction against any recoupment of alleged overpayments based on said determinations.

ROBERT ABRAMS, Attorney-General (Clifford A. Royael of Counsel), for appellants, The Capitol, Albany, New York 12224.

O'CONNELL & ARONOWITZ (Cornelius D. Murray of Counsel), for Cortlandt Nursing Home and others, respondents, 100 State Street, Albany, New York 12207.

OPINION FOR MODIFICATION

WEISS, J.

We hold today that while the six-year time limitation in CPLR 213 does not bar State actions to recoup alleged Medicaid overpayments taken wholly within the administrative process, such actions may, nevertheless, properly be enjoined when an inordinate amount of time has elapsed between the alleged overpayments and the commencement of recoupment.

In these consolidated CPLR article 78 proceedings commenced by three licensed residential health care facilities, Special Term permanently enjoined the State from undertaking further action to recoup alleged Medicaid overpayments, holding that the claims were each for money had and received and time barred by the six-year Statute of Limitations. Under the methodology employed, the Medicaid reimbursement rate for each facility is established prospectively by review of operating costs for a prior base period trended to allow for inflation. The base year cost reports are subsequently audited by the Department of Health (see 10 NYCRR 86-2.7) and retroactive rate adjustments made when overpayments are discovered. The nursing home operator may request modifications of an audit and, thereafter, initiate a full bureau review (10 NYCRR 86-2.7 [d] [e]). There is entitlement to a full-scale administrative hearing in conformity with the State Administrative Procedure Act (10 NYCRR 86-2.7[f]). The State can inititate recoupment prior to a hearing but must, within a reasonable time

thereafter, commence the administrative hearing (*Clove Lakes Nursing Home v. Whalen,* 45 NY2d 873; *Niagara Falls Mem. Med. Center v. Axelrod,* 88 AD2d 777). CPLR article 78 review is available to review a final administrative determination.

In Proceeding No. 1, the Department of Health did not complete its audit of the 1969 and 1970 reports submitted by petitioner Cortland Nursing Home until March, 1976. The audit disallowed certain expenses for which petitioner had been reimbursed in its rate period ending June 30, 1972. It was not until June 25, 1979 that hearings on petitioner's administrative appeal were commenced, culminating in an order on January 26, 1982, almost 12 years later, revising rates for the period ending June 30, 1972. In Proceeding No. 2, petitioner King Street Home, Inc. was notified in March, 1977 that the Department of Health's audit of the 1970 cost report, and in April, 1978 that the audit of the 1971 through 1973 cost reports, both resulted in retroactive revisions of the reimbursement rate for periods from July 1, 1971 through March 31, 1975. Hearings upon that petitioner's administrative appeal were not scheduled until May, 1982, again almost 10 years after payments had been made. In Proceeding No. 3, the audit of petitioner Highland Nursing Home, Inc.'s 1970 through 1972 cost reports was not completed until June 1, 1976, at which time the Department of Health notified petitioner that rate adjustments would be made. On the appeal from that petitioner's CPLR article 78 proceedings seeking a declaratory judgment and an injunction against retroactive rate revisions without a hearing, this court held that recoupment could begin on the condition that a hearing be conducted by the Department of Health

upon petitioner's administrative appeal within 90 days of the commencement of recoupment (*Portnick v. Whalen*, 65 AD2d 827). Although no hearing has been held, the department commenced recoupment in April, 1982. It is from three separate judgments, each permanently enjoining the Department of Health from undertaking any further steps to recoup the alleged Medicaid overpayments, that respondents have brought these consolidated appeals.

Our determination requires that we first address the issue of whether the civil Statute of Limitations in CPLR 213 (subd 2) concerning money actions can bar State action to recoup Medicaid overpayments effectuated wholly within the administrative process. It is beyond cavil that the State's attempted recoupment is not an "action" (see CPLR 105, subd [b]). The Court of Appeals has clearly stated that "an administrative proceeding is not an action" (*Matter of Fiedelman v New York State Dept. of Health*, 58 NY2d 80, 82). Special Term, therefore, erred in holding that CPLR 213 (subd 2) imposed a six-year limitation of time within which the State could seek recovery of overpayment by recoupment, and that portion of each judgment which granted so much of the petitions as sought a declaration that the Department of Health's actions were illegal must be reversed.

We reach a contrary conclusion, however, with respect to that portion of each judgment which enjoined recoupment or attempted recoupment. For the reasons herein stated, we affirm the permanent injunction granted in each judgment. Respondents, citing *City of New York v State of New York* (40 NY2d 659, 668), contend that the audit procedures initiated

within six years of filing of the annual cost reports were timely★ and that any causes of action to recover or recoup overpayments did not accrue until after a final and binding determination was made. Arguing that a Medicaid provider must be afforded due process through an administrative hearing when the commissioner seeks to recoup purported overpayments (*Matter of White Plains Nursing Home v Whalen*, 42 NY2d 838, cert den 434 US 1066), respondents contend that a time bar to recoupment could not commence running until after completion of administrative hearings and rendition of a final determination. Petitioners argue that the State has consistently contended that causes of action to recoup overpayments are "for money had and received and therefore governed by the six-year limitation of CPLR 213" (*People v Duggan*, 30 AD2d 736), which six-year period in cases involving Medicaid reimbursement rate audits commences to run at the time the State makes payment to a facility (see *State of New York v. Sangers Nursing Home*, Supreme Ct. New York County, July 1, 1980, Stecher, J., affd 79 AD2d 899). More than six years having elapsed since payments were made to each petitioner, any action at law would be time barred under CPLR 213 (subd 2). Petitioners finally contend that if the State utilizes the full six-year period within which to audit and then avails itself of an additional like period before making

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★ Effective November 17, 1969, 10 NYCRR 86.8, entitled "Audits", provided that all fiscal and statistical reports are subject to audit. Effective December 19, 1974, paragraph (c) of that regulation provided, "The required fiscal and statistical reports shall be subject to audit for a period of six years form the date of their filing with the department ★ ★ ★." This section was renumbered 86-2.7 effective September 30, 1976.

a final determination upon administrative appeal, it will have created a 12-year period in which to effectuate recoupment, thus being permitted to accomplish administratively what it would be barred from doing in the civil context of the judicial process.

There does not appear to be a Statute of Limitations applicable to the time within which administrative appeals must be commenced or completed. Section 301 (subd 1) of the State Administrative Procedure Act provides: "In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time." The subject proceedings are covered by section 102 (subd 3) of said act. In *Matter of Utica Cheese v. Barber* (49 NY2d 1028), the Court of Appeals inferentially held 90 days to be "within reasonable time", on the facts of that case, for a comissioner to reach a decision under section 301 (subd 1) of the State Administrative Procedure Act. Respondents erroneously rely upon *Matter of Sreter v Axelrod* (Supreme Ct, Albany County, April 26, 1983, Hughes, J.), a Medicaid reimbursement overpayment case, as authority for their contention that the Statute of Limitations barring a civil action is no defense where other means of legal action, such as recoupment, exist. It is well established that the remedy of setoff is available only when based upon a legally enforceable claim (6 Williston, Contracts, [3d ed], § 887E, pp 543-558; see, also, *Grace Line v United States*, 255 F2d 810, 813).

The issue is thus distilled to whether it is reasonable to permit a 10-year delay in reaching a determination by an administrative agency which provides finality to a reimbursement rate. Courts should not permit the

accomplishment of an otherwise impermissible act under the cover of administrative fiat. It is solid public policy that " 'the operation of government not be trammeled by stale litigation and stale determination' " (*Solnick v Whalen,* 49 NY2d 224, 232, citing Mundy *v Nassau County Civ. Serv. Comm.,* 44 NY2d 352, 359 [Breitel, Ch. J., dissenting]). The *Solnick* court wisely held that the financial planning of both government and the providers of Medicaid services required prompt resolution of controversies with respect to final reimbursement rate determination. It can hardly be said that the delays in each of these proceedings, if permitted, would be consonant with the lesson in *Solnick v Whalen* (*supra*). We, therefore, hold that Special Term was correct in permanently enjoining respondents from recoupment of the subject overpayments.

The judgments should be modified, on the law, by reversing so much thereof as granted those portions of the petitions seeking a declaration that the actions taken by respondents were illegal, and, as so modified, affirmed, without costs.

Judgment and Order

JUDGMENT
AND ORDER

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany on August 6, 1982.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
CORTLANDT NURSING HOME,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR.

PRESENT: HON. JOSEPH P. TORRACA, J.S.C.

Petitioner having applied to this Court in this Article 78 proceeding for a Judgment declaring illegal, null and void Respondents' retroactive revision in Petitioner's Medicaid reimbursement rates for periods from July 1, 1970 through December 31, 1972 and for an Order permanently enjoining any attempt by Respondents to recoup monies based on said revisions, and Respondents having filed an Answer in opposition to the Petition and this matter having come on to be heard before me at a Special Term of this Court held

in and for the County of Albany on August 6, 1982, and Petitioner having appeared by O'Connell and Aronowitz, P.C. (Cornelius D. Murray, Esq. of Counsel) and Respondents having appeared by the Hon. Robert Abrams, Attorney General of the State of New York (Richard Freshour, Esq., of Counsel) in opposition to said Article 78 proceeding and due deliberation having been had and this Court having rendered its decision dated November 2, 1982 (a copy of which is annexed hereto as Exhibit "A") now therefore, it is

ORDERED that the Petition be and the same hereby is granted in all respects and it is

FURTHER ORDERED that Respondents, their agents and/or successors in office be and the same hereby are enjoined from recouping or attempting to recoup in any manner whatsoever the alleged over-payments for Medicaid reimbursement rate periods ending on or before December 31, 1972.

/s/ Joseph P. Torraca

Joseph P. Torraca, J.S.C.

ENTER:

Dated: January 10th, 1983
Kingston, New York

Decision

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
CORTLANDT NURSING HOME,

Petitioner,

-against-

DAVID AXELROD, as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

Albany County Special Term, August 6, 1982, Motion Number 1

(Final Papers Received October 18, 1982)

(JUSTICE JOSEPH P. TORRACA, PRESIDING)

APPEARANCES: O'Connell & Aronowitz, Esqs., Attorneys for Petitioner, 100 State Street, Albany, New York 12207

Robert Abrams, Attorney General of the State of New York, for the Respondents, The Capitol, Albany, New York 12224 (Richard J. Freshour, Assistant Attorney General, of counsel)

TORRACA, J.:

Petitioner, a nursing home licensed by the Commissioner of Health of the State of New York, one of the respondents herein, participated in the Medicaid program whereby facilities in the State of New York were reimbursed for certain services provided to eligible Medicaid recipients. Under the regulations governing

such payments, the respondents have disallowed claims which it paid to the petitioner in rate periods ending June 30, 1972. Respondents have now indicated that such disallowed payments will be recaptured or recouped in payments due from them for subsequent periods.

The petitioner brings this Article 78 proceeding asking for a judgment annulling the retroactive Medicaid reimbursement rate determinations of the Commissioner of Health dated January 26, 1982. Such nursing home contends that the alleged overpayments which the state now seeks to establish, were made to petitioner more than six years ago and the state is permanently barred, because of the statute of limitations, from taking any action to recoup or recapture the alleged overpayments.

In effect, the respondents' claim is for money had and received. That being the case, the six year statute of limitations applies to their claim and they are time-barred from bringing any action to recover same (*State of New York v. Sangers Nursing Home*, Supreme Court, New York County, Special Term, Index No. 40181/79 dated 7/1/80; affd 79 A.D. 2d 899; CPLR 201, 213).

In view of the foregoing, the respondents are permanently enjoined from undertaking any further action with reference to the Medicaid reimbursements referred to herein.

Submit order accordingly.

Dated: Kingston, New York
November 2, 1982

(Order to be submitted by O'Connell & Aronowitz, Esqs.)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
CORTLANDT NURSING HOME,

Petitioner,

-against-

VERIFIED PETITION

DAVID AXELROD, as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR

TO: THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY:

Petitioner, Cortlandt Nursing Home, by its attorneys, O'Connell and Aronowitz, P.C., as and for a Petition, states upon information and belief as follows:

1. Cortlandt Nursing Home was, at all times relevant hereto, a nursing home licensed by the Respondent Commissioner of Health of the State of New York pursuant to Article 28 of the Public Health Law.

2. Respondent Axelrod is the Commissioner of Health of the State of New York with his principal offices located in the City and County of Albany and as such he is responsible for carrying out the duties assigned by law to him and to said Department.

3. Respondent Blum is the Commissioner of Social Services of the State of New York with her principal office located in the City and County of Albany and as such she is responsible for the administration and supervision of the Department of Social Services of the State of New York and of the carrying out of the duties assigned by law to her and to said Department.

4. Respondent C. Mark Lawton is the Director of the Budget of the State of New York with his principal offices located in the City and County of Albany, and as such he is responsible for approving the medicaid reimbursement rates established by the Respondent Commissioner of Health for payment to nursing homes.

5. At all times relevant hereto, Petitioner participated in the medicaid program, a joint federal-state program established pursuant to Title XIX of the federal Social Security Act, 42 USC §1396 at *et seq.*, whereby facilities in New York State which participated in said program were reimbursed for services provided to eligible medicaid recipients at rates established by the Commissioner of Health and approved by the Director of the Budget and paid by local social services districts of the State under the jurisdiction and supervision of the Commissioner of Social Services.

6. The regulations governing medicaid reimbursement rates were, at all times relevant hereto, embodied in 10 NYCRR Part 86, which regulations were adopted by the New York State Hospital Review and Planning Council and approved by the Commissioner of Health.

7. Under those regulations, a facility's medicaid reimbursement rate for a given rate period was established based upon costs reported by the facility to the Health Department during a prior base year.

8. Petitioner filed with the Health Department cost reports for the years ending December 31, 1969 and December 31, 1970.

9. These 1969 and 1970 cost reports were filed on or about May 1, 1970 and May 1, 1971, respectively.

10. The 1969 cost report was used by Respondents or their predecessors in office to calculate and pay Petitioner's medicaid reimbursement rate for the period July 1, 1970 through June 30, 1971 and the 1970 cost report was similarly used by Respondents to calculate Petitioner's medicaid reimbursement rate for the period July 1, 1971 through June 30, 1972.

11. Thereafter, and on or about March 30, 1976, the Health Department advised Petitioner that it had completed an audit of Petitioner's 1969 and 1970 cost report and based thereon was disallowing certain expenses which Petitioner had claimed during those years and had been reimbursed for in the subsequent rate periods ending June 30, 1972.

12. Petitioner thereafter administratively appealed those determinations and the Department issued a Notice of Hearing (a copy of which is annexed hereto as Exhibit "A") dated May 1, 1979, scheduling a hearing on the audit items in dispute.

13. Upon conclusion of the hearing, the Commissioner of Health, through his delegee, issued an order (a copy of which is annexed hereto as Exhibit "B") dated January 26, 1982 purporting to uphold many of the disallowances set forth in the audit.

14. The Health Department advised Petitioner of said order by letter dated January 28, 1982 (a copy of which is annexed hereto as Exhibit "C") which was addressed to Petitioner's counsel and received on January 29, 1982.

15. Respondents have not yet sought to recoup or recapture the monies allegedly overpaid as a result of said audit.

16. On information and belief, Respondents are about to undertake such steps.

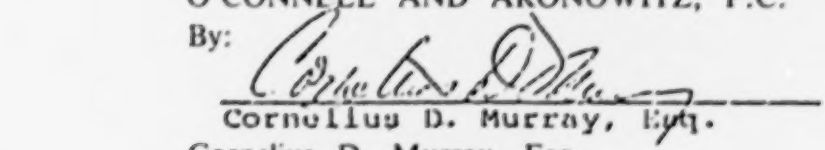
17. Any recapture or recoupment now undertaken would be illegal because (a) the applicable statute of limitations against recovery of funds in such cases is six years and the reimbursement here in dispute was originally paid for rate periods ending July 1, 1972; (b) the State is barred by laches from so acting because it knew of the alleged overpayments at least as early as March 30, 1976; and (c) the regulations in Part 86 then in effect and specifically 10 NYCRR §86.16, specifically prohibited any retroactive rate adjustments except as to matters not applicable in the present case.

WHEREFORE, Petitioner respectfully requests that this Court issue a Judgment declaring the order of the Commissioner of Health dated January 26, 1982 null and void and enjoining Respondents and/or their

agents and/or their successors in office from in any manner recouping or attempting to recoup the alleged overpayments determined by said audits and upheld by the Commissioner's January 26, 1982 order.

Yours, etc.

CORTLANDT NURSING HOME

By:
O'CONNELL AND ARONOWITZ, P.C.
By:

Cornelius D. Murray, Esq.
Cornelius D. Murray, Esq.
Of Counsel
Attorneys for Petitioner
Office and P.O. Address
100 State Street
Albany, New York 12207
Tel: (518) 462-5601

Dated: Albany, New York
May 26, 1982

STATE OF NEW YORK)
ss):
COUNTY OF ALBANY)

Cornelius D. Murray, being duly sworn, desposes and says that he is counsel for the Petitioner herein and that he has read the foregoing Petition and that the same is true except as to matters alleged therein upon information and belief and as to those matters he believes them to be true based upon his familiarity with the file and documentation given to him by his client and conversations with his client.

The reason why this verification is made by deponent and not by the Petitioner, is that Petitioner has its principal place of business in a county other than the County wherein Deponent maintains his offices.

Cornelius D. Murray

Sworn to before me this
26th day of May, 1982.

Notary Public, State of New York

STATE OF NEW YORK : DEPARTMENT OF HEALTH, OFFICE OF HEALTH SYSTEMS MANAGEMENT

IN THE MATTER OF

CORTLANDT NURSING HOME a/k/a CORTLANDT NURSING CARE CENTER, INC.
110 Oregon Road
Peekskill, New York 10566

NOTICE OF HEARING

Request pursuant to Section 86-2.7, Chapter II, of Title of the Code of Rules and Regulations of the State of New York

---

Dr. Percy Garson
Cortlandt Care Ctr., Inc.
110 Oregon Rd.
Peekskill, New York 10566

Ms. Hermina Garson
1134 Main St.
Peekskill, New York 10566

Dr. Percy Garson
1134 Main St.
Peekskill, New York 10566

Stephen A. Mishkin, Esq.
Park Professional Bldg.
Ossining, New York 10562

Ms. Hermina Garson
Cortlandt Care Ctr., Inc.
110 Oregon Rd.
Peekskill, New York 10566

PLEASE BE ADVISED:

THAT a hearing shall be afforded the above named residential health care facility, pursuant to the April 7, 1977 decision of the Hon. Issac Rubin, Justice, New York State Supreme Court, Westchester County, to show why the revision of the rate of reimbursement as shown in the audit report, certified on March 15 and 22, 1976 and the bureau determination, dated July 30, 1976, should be adjusted.

THAT the hearing shall be held on June 12, 13, and 14, 1979, at the Empire State Plaza, Tower Building, Room 1208, Albany, New York 12237, and at such other adjourned dates, times and places as the Hearing Officer may deem necessary.

THAT the jurisdictional basis for said hearing is Section 2803 of the Public Health Law of the State of New York, Section 86-2.7, Chapter II of the Code of Rules and Regulations of the State of New York; and the procedures used shall be as directed, and as may be applicable, pursuant to Section 86-2.7 NYCRR, Section 12-a of the New York State Public Health Law and the State Administrative Procedure Act.

A stenographic record of the proceedings shall be made.

The residential health care facility shall appear in the person of its counsel and/or operator(s); produce its own witnesses and evidence; and cross examine witnesses and examine evidence as may be produced by the New York State Department of Health.

THAT pursuant to Section 86-2.7(f)(2) the burden of proof at said hearing shall be upon the residential health care facility.

The facility shall file a confirmation that it will be prepared to go forward on the above noted scheduled hearing day. Said confirmation shall be sent to Harriet Katz, Esq., New York State Department of Health, Tower Building, 12th Floor, Albany, New York 12237, seven (7) days prior to the hearing date.

THAT in the event the facility fails to appear and go forward with its evidence on the scheduled hearing date, the request for said hearing shall be deemed to have been waived.

THAT the hearing shall be limited to the following issues:

PNH-131
(1969)

1. Whether $750 in accountant fees for work performed in 1966 is allowable for reimbursement purposes.
2. Whether $1,200 in accountant fees, $50 in engineering fees, and $300 in architect fees are allowable for reimbursement purposes.
3. Whether $198 in telephone expence for a phone at the owner's residence is allowable for reimbursement purposes.
4. Whether $63 for telephone directory listing is allowable for reimbursement purposes.
5. Whether $470 in auto expense is allowable for reimbursement purposes.
6. Whether $1,458 of dues and subscriptions expense is allowable for reimbursement purposes.
7. Whether $200 for education courses is allowable for reimbursement purposes.
8. Whether $3,112 of miscellaneous expense for two international trips is allowable for reimbursement purposes.
9. Whether $430 of miscellaneous expense is allowable for reimbursement purposes.
10. Whether $184 for repairs and maintenance is allowable for reimbursement purposes.
11. Whether $5,462 of food expense is allowable for reimbursement purposes.
12. Whether $354 for kitchen supplies is allowable for reimbursement purposes.
13. Whether $444 of laundry expense is allowable

for reimbursement purposes.

14. Whether $459 in housekeeping supplies expense is allowable for reimbursement purposes.

15. Whether $441 in patient recreation expense is allowable for reimbursement purposes.

(1970)

16. Whether $1,618 of legal and accounting expense is allowable for reimbursement purposes.

17a. Whether $813 of insurance expense for the owner and his family's health, life and residence is allowable for reimbursement purposes.

17b. Whether $361 of "insurance on other than property" (1968 Workman's Compensation expense) is allowable for reimbursement purposes.

18. Whether $107 for auto repair in auto and travel expense is allowable for reimbursement purposes.

19. Whether $97 for administration courses listed in auto and travel expense is allowable for reimbursement purposes.

20. Whether a $32 payment to Dr. Garson listed in auto and travel expense is allowable for reimbursement purposes.

21. Whether $325 of dues and subscriptions expense for a payment to Joel Garson for an administrator's course is allowable for reimbursement purposes.

22a. Whether $105 of dues and subscription expense for a payment to the Westchester Nursing Home Association is allowable for reimbursement purposes.

22b. Whether $200 of dues and subscriptions expense for a payment to the New York State Nursing Home Association is allowable for reimbursement purposes.

23. Whether $71 of advertising expense for directory advertising is allowable for reimbursement purposes.

24. Whether $218 of miscellaneous expence for moving expense is allowable for reimbursement purposes.

25. Whether $156 of miscellaneous expense is allowable for reimbursement purposes.

26, Whether $61 of miscellaneous expense is allowable for reimbursement purposes.

27. Whether $88 of mortgage tax expense is allowable for reimbursement purposes.

28. Whether the estimated useful life of certain movable equipment for depreciation should be five or ten years.

29. Whether $885 of real estate tax expense for payments on the administrator's residence is allowable for reimbursement purposes.

30. Whether $300 of painting expense for the administrator's residence is allowable for reimbursement purposes.

31. Whether $2,014 of laundry income should have been offset against laundry expense.

32a. Whether $117 of housekeeping supplies expense for items from Macy's is allowable for reimbursement purposes.

32b. Whether $154 of housekeeping supplies expense for kitchen improvements at the administrator's residence is allowable for reimbursement purposes.

33. Whether the estimated useful life of certain items in repairs and maintenance expense should be ten years rather than 20 years.

34. Whether $13 of repairs and maintenance expense for Peekskill Electric Motor is allowable for reimbursement purposes.

35. Whether $1,542 of repairs and maintenance expense relating to the administrator's residence is allowable for reimbursement purposes.

36, Whether $112 of maintenance supplies expense for reimbursements to Levinson and Pfeiffer relating to the administrator's residence is allowable for reimbursement purposes.

37. Whether $124 of heat, light and power expense for the administrator's residence is allowable for reimbursement purposes.

38. Whether the estimated useful life of a bed and chart desk should be five years rather than ten years.

39a. Whether $513 of depreciation expense for the administrator's residence is allowable for reimbursement purposes.

39b. Whether the estimated useful life of non-moveable equipment should be ten rather than twenty years.

40. Whether $4,563 of insurance classified as insurance on property is allowable for reimbursement purposes.

41. Whether the $6,861 net book value of the administrator's residence should be part of the equity of the nursing home.

42. Whether 690 patient days should be added to 15,489 for a total of 16,425 patient days.

DATED: Albany, New York
May 1, 1979

Melinda A. Bass

MELINDA A. BASS
Counsel
New York State Department of Hea
Office of Health Systems Manage

Inquiries to: Harriet Katz, Esq.
Telephone No. (518) 474-3971

Exhibit B - Order

STATE OF NEW YORK : DEPARTMENT OF HEALTH

IN THE MATTER
OF

CORTLANDT NURSING HOME a/k/a CORTLANDT NURSING CARE CENTER, INC.
110 Oregon Road
Peekskill, New York 10566

ORDER

Request Pursuant to Section 86-2.7, Chapter II of Title 10 of the Code of Rules and Regulations of the State of New York

---

Dr. Percy Garson
Cortlandt Care Ctr., Inc.
110 Oregon Rd.
Peekskill, New York 10566

Mr. Cornelius D. Murray, Esq.
O'Connell & Aronowitz, P.C.
100 State Street
Albany, N.Y. 12207

A hearing in the above-captioned matter having been commenced at the request of CORTLANDT NURSING CARE CENTER (hereinafter referred to as "the Petitioner") in order to reverse Audit report PNH 131 certified on March 15 and 22, 1976, and the Bureau of Audit Appeals Determination dated July 30, 1976, and the Notice of Hearing dated May 1, 1979 having been issued by the New York State Department of Health and the matter having come on regularly to be heard on June 25, October 11, 12, November 5, 19, 27, December 10, 14, 1979, and January 16, 22, February 21, 27, April 21, May 8, 20, June 4, 12, 18 and July

1, 1980 before Karla M. Moskowitz, Administrative Law Judge presiding; and the Petitioner having appeared by Goldman, Cooperman & Leavitt, Esqs. by Robert Goldman, Esq., of Counsel until August 18, 1980 and thereafter by O'Connell and Aronowitz, P.C., Cornelius D. Murray, Esq., of Counsel, and the Department having appeared by Melinda A. Bass, Esq. Counsel, and later by Peter J. Millock, Esq., General Counsel, Harriet Katz, Esq., Steven Steinhardt, Esq. and Synnova H. Goodin, Esq., of Counsel and transcript of the proceeding having been made and exhibits received in evidence and post-hearing memoranda, replies and cases relied on having been submitted by the parties, and the Administrative Law Judge's report dated August 28, 1981, having been submitted, a copy of which is attached hereto and made a part of this Order.

NOW, on reviewing the record of the above entitled matter, the Commissioner of Health of the State of New York adopts the findings of fact and the conclusions and recommendations of the Administrative Law Judge as his own.

It is therefore ORDERED:

1. The audit disallowances referred to in Items 1, 2, 3, 5, 7, 8, 9, 11, 12, 13, 14, 15, 17b, 18, 20, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32a, 32b, 33, 35, 36, 37, 38★, 39b★, and 40 of the Notice of Hearing shall be sustained.

★Item 38 is a duplication of Item 28; Item 39b is a duplication of Item 33.

2. The audit disallowances referred to in Items 4, 10, 23, 34, 39a, and 41 of the Notice of Hearing shall be reversed and the amount set forth in those items shall be allowed for reimbursement purposes.

3. The audit disallowance referred to in Item 6 of the Notice of Hearing shall be sustained except for $480.00 which shall be allowed for reimbursement purposes.

4. The audit disallowance referred to in Item 16 of the Notice of Hearing shall be sustained except for $220.00 which shall be allowed for reimbursement purposes.

5. The audit disallowance referred to in Item 17 a of the Notice of Hearing shall be sustained except for insurance on 24 Pumphouse Road, which shall be allowed for reimbursement purposes if under the salary ceiling limitation

6. The audit disallowances referred to in Items 19 and 21 of the Notice of Hearing shall be reversed and allowed for reimbursement purposes if under the salary ceiling limitation.

7. The patient days used to calculate the July 1, 1971 to June 30, 1972 rate, referred to in Item 42 of the Notice of Hearing shall be 15,489.

It is further ORDERED:

THAT a Medicaid rate of reimbursement be promulgated reflecting the adjustments set forth in this Order.

DATED: Albany, New York
Jan 26, 1982

DAVID AXELROD, M.D., COMMISSIONER
New York State Department of Health

By:
RAYMOND D. SWEENEY

RAYMOND D. SWEENEY
Executive Deputy Director
Office of Health Systems Management

January 28, 1982

Mr. Cornelius D. Murray, Esq.
O'Connell & Aronowitz, P.C.
100 State Street
Albany, NY 12207

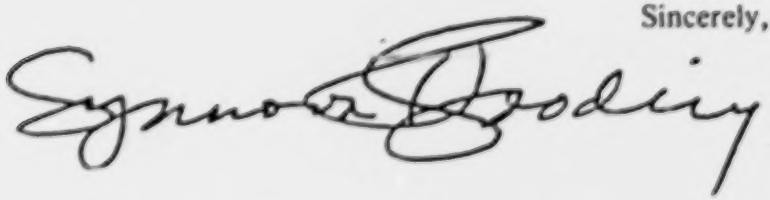
Re: Cortlandt Nursing Home
a/k/a/Cortland Nursing
Care Center, Inc.

Dear Mr. Murray:

Attached find a copy of the Commissioner's Order (signed by Raymond D. Sweeney, Executive Deputy Director, Office of Health Systems Management on January 26, 1982) in the above matter,

If you have any questions on the subject, feel free to call me.

Sincerely,



Synnova H. Gooding
Senior Attorney
(518) 473-5174

Attachment

Judgment and Order

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany on August 6, 1982.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
HIGHLAND NURSING HOME, INC.,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

JUDGMENT AND ORDER

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR.

PRESENT: HON. JOSEPH P. TORRACA, J.S.C.

Petitioner having applied in this Article 78 proceeding by Order to Show Cause dated June 30, 1982, for a Judgment declaring illegal, null and void Respondents' attempted retroactive revision of Petitioner's Medicaid reimbursement rates for rate periods beginning July 1, 1971 through December 31, 1974, and for a permanent injunction against any recoupment of alleged overpayments based on said revisions, and Respondents having filed their Answer in opposition to said Article 78 proceeding and this matter having come

on to be heard before me at a Special Term of this Court held in and for the County of Albany on August 6, 1982, and Petitioner having appeared by O'Connell and Aronowitz, P.C. (Cornelius D. Murray, Esq., of counsel) in support of said Petition and Respondents having appeared by the Hon. Robert Abrams (Attorney General of the State of New York, Richard Freshour, Esq., of counsel) in opposition to said Petition, and due deliberation having been had and this Court having rendered its Decision dated November 2, 1982, now therefore, it is

ORDERED that the Petition be and the same hereby is granted in all respects and it is

FURTHER ORDERED that Respondents, their agents and/or successors in office be and the same hereby are permanently enjoined from recouping or attempting to recoup in any manner whatsoever the monies attributable to said revisions.

/s/ Joseph P. Torraca
Joseph P. Torraca, Justice

ENTER:

Dated: January 10th, 1983
Kingston, New York

Decision

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In th Matter of the Application of
HIGHLAND NURSING HOME, INC.,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of the Department of Health of the State of New York; BARBARA BLUM as Commissioner of Social Services of the State of New York; and DONALD KITCHEN, as Commissioner of Social Services of St. Lawrence County,

Respondents.

Albany County Special Term, August 6, 1982, Motion Number 18 (Final Papers Received October 18, 1982)

(JUSTICE JOSEPH P. TORRACA, PRESIDING)

APPEARANCES: O'Connell & Aronowitz, Esqs., Attorneys for Petitioner, 100 State Street, Albany, New York 12207

Robert Abrams, Attorney General of the State of New York, for the Respondents, The Capitol, Albany, New York 12224 (Richard J. Freshour, Assistant Attorney General, of counsel)

TORRACA, J.:

Petitioner, a nursing home licensed by the Commissioner of Health of the State of New York, one of the respondents herein, participated in the Medicaid

program whereby facilities in the State of New York were reimbursed for certain services provided to eligible Medicaid recipients. Under the regulations governing such payments, the respondents have disallowed claims which it paid to the petitioner in rate periods ending June 30, 1972. Respondents have now indicated that such disallowed payments will be recaptured or recouped in payments due from them for subsequent periods.

The petitioner brings this Article 78 proceeding asking for a judgment annulling the retroactive Medicaid reimbursement rate determinations of the Commissioner of Health dated January 26, 1982. Such nursing home contends that the alleged overpayments which the state now seeks to establish, were made to petitioner more than six years ago and the state is permanently barred, because of the statute of limitations, from taking any action to recoup or recapture the alleged overpayments.

In effect, the respondents' claim is for money had and received. That being the case, the six year statute of limitations applies to their claim and they are time-barred from bringing any action to recover same (*State of New York v. Sangers Nursing Home*, Supreme Court, New York County, Special Term, Index No. 40181/79 dated 7/1/80; affd 79 A D 2d 899; CPLR 201, 213).

In view of the foregoing, the respondents are permanently enjoined from undertaking any further action with reference to the Medicaid reimbursements referred to herein.

Submit order accordingly.

Dated: Kingston, New York
November 2, 1982

(Order to be submitted by O'Connell & Aronowitz, Esqs.)

Petition

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
HIGHLAND NURSING HOME, INC.,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM as Commissioner of Social Services of the State of New York; and DONALD KITCHEN, as Commissioner of Social Services of the State of New York,

Respondents.

Verified Petition

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioner, Highland Nursing Home, Inc., by its attorneys, O'Connell and Aronowitz, P.C., as and for a Petition, respectfully states on information and belief as follows:

1. Petitioner is a domestic corporation with its principal offices located in Massena, New York, and at all times relevant hereto has been the operator of a residential health care facility licensed by the Respondent Commissioner of Health pursuant to Article 28 of the Public Health Law of the State of New York.

2. Respondent Axelrod is the Commissioner of Health of the State of New York with his principal offices located in the City and County of Albany, and as such he is responsible for the administration and

supervision of the New York State Department of Health and is responsible for carrying out the duties assigned by law to him and to said Department.

3. Respondent Blum is the Commissioner of Social Services of the State of New York with her principal offices located in the City and County of Albany, and as such she is responsible for the administration and supervision of the New York State Department of Social Services and for the carrying out of the duties assigned by law to her and to said Department.

4. Respondent Donald Kitchen is the Commissioner of Social Services of the St. Lawrence County Department of Social Services.

5. At all times relevant hereto Petitioner has participated in the Medicaid program, a joint federal-state grant-in-aid program established pursuant to Title XIX of the Federal Social Security Act, 42 USC, §1396 *et. seq.*, whereby nursing home facilities, such as Petitioner, which provide services to eligible Medicaid recipients, are entitled to be reimbursed for the costs incurred in providing such services at rates established by the New York State Department of Health and paid by local social services districts throughout the State under the jurisdiction and control of Respondent Blum.

6. Under Section 2807 of the Public Health Law, nursing homes participating in the Medicaid program are reimbursed at rates established by the Commissioner of Health pursuant to regulations contained in Part 86 of 10 NYCRR.

7. Under the methodology adopted in Part 86, a facility's Medicaid reimbursement rate for a given rate period is determined by reviewing costs reported by a facility during a prior base period, which costs are then trended forward to allow for inflation between the base cost period and the subsequent rate period.

8. In this fashion, costs reported by Petitioner for the years 1970, 1971 and 1972 were used by the Health Department to reimburse Petitioner for rate periods beginning July 1, 1972 and ending December 31, 1974.

9. Thereafter and on or about June 2, 1976, the Health Department advised Petitioner that it had completed an audit of Petitioner's 1970, '71 and '72 cost reports, and based thereon would be making rate adjustments in Petitioner's rates. Attached hereto as Exhibit "A" is a copy of this June 2, 1976 letter from the Health Department.

10. Thereafter Petitioner initiated an Article 78 proceeding in State Supreme Court in Albany County to enjoin any attempted retroactive revision in rates without affording Petitioner a hearing.

11. Judgment was entered under Index No. 2610-77 on March 9, 1977, pursuant to an Order by Edward S. Conway, Supreme Court Justice, enjoining any recoupment without a hearing. A copy of said Judgment is annexed hereto as Exhibit "B".

12. The State of New York thereafter appealed to the Appellate Division, Third Department, which rendered a Decision dated November 2, 1978, under

the caption *Portnick v. Whalen* 65 AD2d 827, which modified the lower court decision by stating that recoupment could begin but only if the Department of Health granted a hearing within 90 days of the commencement of the recoupment. A copy of said Decision is annexed hereto as Exhibit "C".

13. To date no hearing has been held.

14. On or about January 25, 1982, Petitioner was advised by Respondent, Donald E. Kitchen, Commissioner of Social Services of St. Lawrence County, that Respondent Commissioner of Social Services would soon be adjusting Petitioner's Medicaid reimbursement rate to recoup the funds allegedly overpaid to Petitioner by that County for rate periods ending December 31, 1974, based upon the prior audit adjustments. A copy of said letter is annexed hereto as Exhibit "D".

15. The total amount of the recoupment was stated to be $83,319.35.

16. The sums allegedly overpaid to Petitioner, and which Respondent now proposes to recoup out of current Medicaid reimbursements were paid to Petitioner more than six years ago.

17. The applicable Statute of Limitations for money had and received in New York is six years (CPLR §213).

18. The time within which the State could commence an action for recoupment has therefore elapsed.

19. Similarly, the time in which Respondent may exercise its common law right of recoupment has expired.

20. Nevertheless, on or about April 1, 1982, the local Social Services Department of St. Lawrence County began to withhold from current reimbursement due to Petitioner amounts attributable to recoupment for adjustments in rate periods ending December 31, 1974.

21. Respondents have recouped and continue to recoup said moneys without affording Petitioner its due process right to a hearing.

22. In any event, even if Respondents were to hold such hearing, none of said recoupment would be permissible since Respondents clearly lack the authority under New York State law to effectuate recoupment for rate periods ending more than six years ago (see *Grace Line, Inc. v. United States,* 255 F2d 810 [2d Cir. 1958]).

WHEREFORE, Petitioner respectfully demands that this Court enter Judgment against Respondents, their agents and/or successors in office from any way effectuating the recoupment proposed in the letter of January 25, 1982, and Petitioner seeks a further Order directing Respondents, their agents and/or successors in office to repay to Petitioner any funds already so recouped. Petitioner requests such other further and different relief as to this Court seems just and appropriate.

Yours, etc.

HIGHLAND NURSING HOME INC.

By:

O'CONNELL AND ARONOWITZ, P.C.
By: _____
Cornelius D. Murray, Esq.
of Counsel
Office and P.O. Address
100 State Street
Albany, NY 12207
Tel. (518) 462-5601

Dated: June 27, 1982

HON. ROBERT ABRAMS
Attorney General of the
State of New York

HON. DAVID AXELROD
Commissioner of Health of the
State of New York

HON. BARBARA BLUM
Commissioner of Social Services
of the State of New York

HON. DONALD KITCHEN
Commissioner of the St. Lawrence County
Department of Social Services

STATE OF NEW YORK)
)ss:
COUNTY OF ALBANY)

Cornelius D. Murray, being duly sworn, deposes and says that is is an attorney-at-law and is a member of the law firm of O'Connell and Aronowitz, P.C., attorneys for the Petitioner, that he has read the foregoing Petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by the Petitioner, is that Petitioner is not a resident within the County of Albany, which is the county where deponent has his offices.

Cornelius D. Murray

Sworn to before me this
29th day of June, 1982.

Notary Public, State of New York

Exhibit A - Letter from William F. McCann

STATE OF NEW YORK
DEPARTMENT OF HEALTH

TOWER BUILDING
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12237

June 2, 1976

Mr. Edward Kaneb
Operator
Highland Nursing Home
Highland Road
Massena, New York 13662

Dear Mr. Kaneb:

The audit of your financial cost report for the years ending 1970, 1971 and 1972 which was completed recently by the Bureau of Provider Audit, disclosed the adjustments which are detailed on the attached schedule. These adjustments are final, unless we receive a written protest within 30 days from receipt of this letter. Such request must be in writing, detailing each adjustment disputed and setting forth the reimbursement principle or basis for disputing each item.

These adjustments have been computed by our Bureau of Health Care Reimbursement, which will adjust your rate according to attached HE-12b rate change schedule. These adjusted rates are final unless we receive a written protest within 30 days detailing any errors in the computation of such rates.

Also attached is a list of recommendations on controls and procedures which have been discussed with you at time of audit, which we hope have been implemented or will be implemented shortly.

Should you have any questions regarding these adjustments, please contact us.

Very truly yours,

William F. McCann
Assistant Commissioner

Attachments

1. Audit Report
2. HE-12b, Rate Computation Sheet

Exhibit B - Judgment

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, in the Albany County Courthouse, on the 11th day of February, 1977.

PRESENT: HON. EDWARD S. CONWAY, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

EDWARD J. KANEB, as owner and operator of HIGHLAND NURSING HOME,

Plaintiff,

-against-

ROBERT P. WHALEN, as Commissioner of Health of the State of New York; PHILIP TOIA, as Commissioner of the Department of Social Services of the State of New York; and PETER GOLDMARK, as Director of the Budget of the State of New York,

JUDGMENT
Index No.

Defendents.

Upon reading and filing the Order to Show Cause signed by the Hon. Lawrence E. Kahn, Justice of the Supreme Court, dated February 8, 1977, and the Verified Complaint in this matter, verified the 8th day of February, 1977, wherein Plaintff requests an Order declaring illegal and permanently enjoining Defendants fr[illegible] enforcing their decision to retroactively reduce the Plaintiff's Medicaid reimbursement rates without a Due Process Hearing, and upon the Verified Answer of the Defendants herein, and this matter having come on to be heard before me at a Special Term of this Court held at the Albany County Courthouse on February 11, 1977, and the Plaintiff having appeared by O'Connell and Aronowitz, P.C. (Daniel M. Sleasman, Esq.,

of counsel) in support of the motion, and the Attorney General of the State of New York, Louis J. Lefkowitz, (John Dufur, Esq., of counsel) having appeared in opposition thereto, and after due deliberation the Court having rendered a decision, it is

ORDERED AND ADJUDGED, that the retroactive adjustments of the Medicaid reimbursement rates of the Plaintiff for the years 1969, 1970, 1971 and 1972 are hereby declared null and void, and it is further

ORDERED AND ADJUDGED, that the matter be remanded to the Commissioner of Health for a Due Process Hearing on the challenges brought to said adjustments, and it is further

ORDERED AND ADJUDGED, that the Defendants, their agents and/or successors in office are enjoined from attempting to withhold any current Medicaid payments in order to collect the rate reductions which were hereby declared illegal.

EDWARD S. CONWAY, J.S.C.

ENTER: Albany County
Clerks Office 3/11/77
DATED: Albany, New York
March 9, 1977

November 2, 1978 31093

ALAN PORTNICK et al., Doing Business as INGERSOLL NURSING HOME, et al.,

Respondents,

vs.

ROBERT P. WHALEN, as Commissioner of Health of the State of New York, et al.,

Appellants.

Appeals from separate judgments of the Supreme Court at Special Term, entered March 11, 1977 in Albany County, which declared retroactive adjustments of each of the plaintiffs' Medicaid reimbursements to be null and void, remanded the matter to the Commissioner of Health for due process hearings, and enjoined the defendants from withholding current Medicaid payments to collect the illegal rate reductions.

Plaintiffs are operators of four different nursing homes licensed by the State of New York pursuant to article 28 of the Public Health Law. The facilities are reimbursed by the State for certain expenses incurred in accepting Medicaid patients, The Department of Health audits the nursing homes periodically. Defendants audited plaintiffs' nursing homes and found varying amounts to have been overpaid to each one. Plaintffs protested the findings of the audits. The Rate Review Board affirmed the findings of the Department of Health auditor and its recommendation was upheld by the Commissioner of Health.

Plaintiffs contend that due process requires the Department of Health to grant them a full evidentiary hearing prior to summary recoupment by the State and that the Department's regulation (10 NYCRR 86-2.7) requires such a hearing. Defendants contend that the

plaintiffs' actions should have been brought as article 78 proceedings, and are time-barred by the four-month statute of limitation found in section 217 of the CPLR.

Identical issues were most recently decided by this court in *Solnick d/b/a Dover Nursing Home v. Whalen* (—A D 2d — [June 15, 1978]), where it was held that plaintiffs were not denied due process for lack of a hearing prior to recoupment, but due process requires a hearing within 90 days of the commencement of recoupment. The determination of audit results of the Ingersoll Nursing Home became final on July 30, 1976, the Harding Nursing Home on May 26, 1976, the Riverdale Nursing Home on December 17, 1976 and the Highland Nursing Home on December 17, 1976 for audits covering 1970-1972 and June 1, 1976 for the 1969 audit. No hearings have yet been accorded the plaintiffs. Recoupment commenced in 1976 with the Ingersoll Nursing Home which was forced to close because of the reduction of payments. As to the others, there is no indication that recoupment has been undertaken. In order to comply with the requirements of due process the formal administrative hearing should be held within 90 days of the date when recoupment is begun by respondents and, as to the Ingersoll Home, within 10 days of notice of this decision,.

Subdivisions (f) and (g) of section 86-2.7 of title 10 of the Codes, Rules and Regulations (10 NYCRR 86-2.7 [f] [g]) which provide machinery for a hearing were not effective until January 31, 1977 and are not applicable to the cases at bar.

Finally, it has been repeatedly held that an article 78 proceeding is not the proper method of challenging rate-making (e.g., *Clove Lakes Nursing Home v. Whalen*, 60 AD 2d 687; *Matter of White Plains Nursing Home v. Whalen*, 53 AD 2d 926, affd, 42 NY 2d 839, cert. den. — US —, 98 S. Ct 1224). Plaintiffs' actions were properly brought as ones for declaratory judgment and are not barred by four-month statue of limitations applicable to proceedings under article 78.

Judgment modified, on the law, by deleting the first and third decretal paragraphs thereof and by amending the second decretal paragraph to read:

> Ordered and adjudged that the matter be remanded to the Commissioner of Health for the purpose of affording a full administrative hearing to plaintiffs Alan Portnick and Stanley Katz as operators of the Ingersoll Nursing Home within 10 days of the service of this order on the Commissioner of Health and as to plaintiffs, Robert S. Harding as operator of the Harding Nursing Home, Edward J. Kaneb as operator of the Riverdale Nursing Home and Highland Nursing Home, a full administrative hearing on plaintiffs' challenges to the audit results, within 90 days of the effective date of the prospective Medicaid rate adjusted to recoup overpayments resulting from the audit

and, as so modified, affirmed, without costs.

MAHONEY, P.J., GREENBLOTT, LARKIN, MIKOLL and HERLIHY, J.J., concur.

Exhibit D - Letter from Donald Kitchin

St. Lawrence County
Department of Social Services
DONALD E. KITCHEN
COMMISSIONER

Kindly Reply to:

CANTON, NEW YORK 13617
PHONE 315 379-2111

January 25, 1982

Mr. Edward Kaneb, Proprietor
Highland Nursing Home
Highland Road
Massena, New York 13662

Dear Mr. Kaneb:

I am writing to you in further reference to our telephone conversation of December 14, 1981 concerning the retroactive adjustment which was approved by the State Department of Health pursuant to 77-MHR-7 for adjustments of the period 11/1/71 through 10/31/72; 1/1 - 12/31/73 and 1/1 - 12/31/74, billed to your facility on November 15, 1978 in the amount of $83,319.33.

We have been advised by the New York State Department of Social Services that the New York State Department of Health advised us that recoupment may be commenced in the above matter.

For your information, the authority was given to the New York State Department of Social Services by letter dated November 25, 1981 directed to Mr. Robert F.

Skerrett, Associate Commissioner, Division of Medical Assistance, New York State Department of Social Services by William J. Gormley, Director, Bureau of Residential Health Care Facility Reimbursement.

If there are any questions that you have, I would suggest that you contact Mr. Gormley directly.

Trusting that I may have your cooperation in this matter and that you will contact me after review of this request, I am

Very truly yours,

DONALD E. KITCHIN
COMMISSIONER

DEK/ms

Judgment and Order

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany on August 6, 1982.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
KING STREET HOME, INC.,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

JUDGMENT AND ORDER

For a Judgment Pursuant to Article 78 of the CPLR.

PRESENT HON. JOSEPH TORRACA, J.S.C.

Petitioner, having moved in this Article 78 proceeding by Order to Show Cause dated May 27, 1982, for a Judgment declaring illegal, null and void Respondent's attempted retroactive revision of Petitioner's Medicaid reimbursement rates for rate periods beginning July 1, 1971 and ending December 31, 1975, and for a permanent injunction against any recoupment of alleged overpayments based on said revisions, and upon reading the said Order to Show Cause and the Petition and the Verified Answer of Respondents and the Affidavit of Yale Wilner dated July 28, 1982, and this matter having come on to be heard before me at a Special

Term of this Court held in Albany County, at the Albany County Courthouse on August 6, 1982, and heard before me at a Special Term of this Court held in Albany County Courthouse on August 6, 1982, and Petitioner having appeared by O'Connell and Aronowitz, P.C. (Cornelius D. Murray, Esq., of counsel) in support of said application and Respondents having appeared by the Hon. Robert Abrams, Attorney General of the State of New York (Richard Freshour, Esq., of counsel) in opposition to said application, and due deliberation having been had and this Court having rendered its decision dated November 2, 1982 (a copy of which is annexed hereto as Exhibit "A"), now therefore it is

ORDERED that the Petition be and the same hearby is granted in all respects and it is

FURTHER ORDERED that Respondents, their agents and successors in office be and the same hearby are enjoined from recouping or attempting to recoup in any fashion whatsoever the alleged overpayments for Medicaid reimbursement rate periods ending on or before December 31, 1975.

/s/ Joseph P. Torraca
Joseph P. Torraca, Justice

ENTER:

Dated: January 10th, 1983
Kingston, New York

Decision

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the
Application of KING STREET
HOME, INC.,

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

Albany County Special Term, August 6, 1982, Motion Number 15 (Final Papers Received October 18, 1982)

(JUSTICE JOSEPH P. TORRACA, PRESIDING)

APPEARANCES:

O'Connell & Aronowitz, Esqs., Attorneys for Petitioner, 100 State Street, Albany, New York 12207

Robert Abrams, Attorney General of the State of New York, for the Respondents, The Capitol, Albany, New York 12224 (Richard J. Freshour, Assistant Attorney General, of counsel)

TORRACA, J.:

Petitioner, a nursing home licensed by the Commissioner of Health of the State of New York, one of the respondents herein, participated in the Medicaid program whereby facilities in the State of New York were reimbursed for certain services provided to eligible Medicaid recipients. Under the regulations governing such payments, the respondents have disallowed claims which it paid to the petitioner in rate periods ending June 30, 1972. Respondents have now indicated that such disallowed payments will be recaptured or

recouped in payments due from them for subsequent periods.

The petitioner brings this Article 78 proceeding asking for a judgment annulling the retroactive Medicaid reimbursement rate determinations of the Commissioner of Health dated January 26, 1982. Such nursing home contends that the alleged overpayments which the state now seeks to establish, were made to petitioner more than six years ago and the state is permanently barred, because of the statute of limitations, from taking any action to recoup or recapture the alleged overpayments.

In effect, the respondents' claim is for money had and received. That being the case, the six year statue of limitations applies to their claim and they are time-barred from bringing any action to recover same (*State of New York v. Sangers Nursing Home*, Supreme Court, New York County, Special Term, Index No. 40181/79 dated 7/1/80; affd 79 AD 2d 899; CPLR 201, 213).

In view of the foregoing, the respondents are permanently enjoined from undertaking any further action with reference to the Medicaid reimbursements referred to herein.

Submit order accordingly.

Dated: Kingston, New York
November 2, 1982

(Order to be submitted by O'Connell & Aronowitz, Esqs.)

Petition

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the
Application of KING STREET HOME, INC.,

VERIFIED PETITION

Petitioner,

-against-

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; and C. MARK LAWTON, as Director of the Budget of the State of New York,

Respondents.

For a Judgment pursuant to Article 78 of the CPLR.

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ALBANY:

Petitioner, King Street Home, Inc., by its attorneys, O'Connell and Aronowitz, P.C., upon information and belief, alleges as follows:

1. Petitioner, King Street Home, Inc., is the owner and operator of the King Street Home, Inc., a residential health care facility licensed by the Respondent Commissioner of Health of the State of New York pursuant to Article 28 of the Public Health Law.

2. Respondent Axelrod is the Commissioner of Health for the State of New York with his principal offices located in the City and County of Albany and as such is responsible for the administration and supervision of the duties assigned by law to him and to said Department.

3. Respondent Blum is the Commissioner of Social Services of the State of New York with her principal offices located in the City and County of Albany and as such she is responsible for the administration and supervision of the Department of Social Services and the carrying out of duties assigned by law to her and to said Department.

4. Respondent C. Mark Lawton is the Director of the Budget of the State of New York with his principal offices located in the City and County of Albany, and as such he is responsible for approving the medicaid reimbursement rates established by the Respondent Commissioner of Health for payment to residential health care facilities.

5. At all times relevant hereto, Petitioner has participated in the medical assistance ("medicaid") program, a joint federal-state program established pursuant to Title XIX of the Federal Social Security Act whereby facilities in New York State which participate in said program are reimbursed for nursing home services rendered to eligible medicaid patients at rates established and certified by the Commissioner of Health, approved by the Director of the Budget, and paid by local social services districts under the jurisdiction of the Respondent Commissioner of Social Services.

6. The methodology for reimbursing the said facilities is contained in regulations adopted by the New York State Hospital Review and Planning Council and approved by the Commissioner of Health. At all times relevant hereto said regulations were set forth in Part 86 of Title X of the Official Compilation of Codes, Rules and Regulations for the State of New York; 10 NYCRR §86.1 *et. seq.*

7. Under those regulations, a facility was reimbursed for medicaid services during a given rate period based upon costs reported by the facility to the State Health Department during a prior base period.

8. Petitioner filed separate cost reports with the State Health Department for the years ending 1970, 1971, 1972 and 1973.

9. All of said reports were filed by no later than May 1, 1974.

10. The 1970 cost report was used by Respondents to calculate and pay Petitioner a medicaid reimbursement rate for the period of July 1, 1971 through June 30, 1972; the 1971 cost report was used to calculate and pay rates for the period July 1, 1972 through December 31, 1973; the 1972 cost report was used to calculate and pay rates for calendar year 1974 and the 1973 cost report was used to calculate and pay rates for calendar year 1975.

11. Thereafter the Health Department concluded an audit of said cost reports and calculated that certain expenses contained therein were not reimbursable under

the medicaid program and subsequently, an exit conference for the audits in question was held with Petitioner in 1975 at which time the Respondent's auditors had knowledge of and asserted the alleged overpayments contained in the annexed Notice of Hearing.

12. Petitioner, upon being advised of said audit, contested the conclusions of the audit and submitted letters of protest to the Health Department.

13. The State Health Department, after considering Petitioner's protest, concluded nevertheless that certain expenses were not recognizable under the medicaid program and thereupon recalculated Petitioner's medicaid reimbursement rates for the applicable rate periods ending December 31, 1975.

14. The State had made no effort to recoup the difference between the amount paid based upon the original rates and the revised rates calculated subsequent to the audit.

15. On or about May 4, 1982, Respondent served upon Petitioner a Notice of Hearing (Exhibit "A") purporting to hold a hearing scheduled to begin on June 2, 1982 concerning the issue of the reimbursability of the expenses disallowed by the Health Department on audit.

16. At issue, according to the Health Department's own counsel, Synnova Gooding, is approximately $43,000.00 in medicaid reimbursement paid to the facility for rate periods ending December 31, 1975.

17. By no later than October, 1975, the State knew and had actual notice of the alleged overreimbursement.

18. Even if the Health Department were correct and the expenses were not reimbursable, more than six years has elapsed since the Petitioner was paid and the State is barred by the applicable Statue of Limitations and laches from recouping said funds or further pursuing the issues involving the alleged overreimbursement.

19. To hold a hearing on said issues now is, therefore, unnecessary and would be a considerable waste of time and expense both to the State and to Petitioner.

20. No previous relief of any kind relative to this matter has been pursued in any Court by Petitioner.

WHEREFORE, Petitioner respectfully urges that this Court grant its application for a Judgment declaring that the applicable six year Statue of Limitations has run and that Respondents are barred thereby and also by laches from pursuing any recovery or attempted recovery of alleged medicaid overreimbursement to Petitioner for rate periods ending on December 31, 1975. Petitioner further respectfully requests that this Court enjoin Respondents from further pursuing the matter in any fashion and Petitioner further requests that this Court grant such other, further and different relief as to it seems just and appropriate including the costs and disbursements of this action.

YOURS, ETC.

KING STREET HOME, INC.
BY:

O'CONNELL AND ARONOWITZ, P.C.

By: Cornelius D. Murray
Cornelius D. Murray, Esq.
of counsel

Office and P.O. Address
100 State Street
Albany, NY 12207
Tel. (518) 462-5601

TO: HON. DAVID AXELROD, Commissioner of Health State of New York

HON. BARBARA BLUM, Commissioner of Social Services State of New York

HON. C. MARK LAWTON, Director of the Budget State of New York

HON. ROBERT ABRAMS, Attorney General State of New York

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

Cornelius D. Murray, Esq., being duly sworn, deposes and says that he is the attorney for the Petitioner, in this action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true and that the basis of his knowledge are the records and communcations of his client to him. The reason why this Petition is verified by deponent is that the client has its principal place of business and location in a county other than the county wherein deponent maintains his offices.

Cornelius D. Murray
Cornelius D. Murray

Sworn to before me this
25th day of May, 1982.
Donna M. Bolognino
Notary Public, State of New York

Exhibit A - Notice of Hearing Annexed to Verified Petition

STATE OF NEW YORK : DEPARTMENT OF HEALTH

IN THE MATTER
OF
KING STREET NURSING HOME
PNH-251
(1970-1973)

Request pursuant to Section 86-2.7, Chapter II, Title 10 of the Codes, Rules and Regulations of the State of New York.

NOTICE OF HEARING

TO:
Yale Wilner, Administrater
King Street Nursing Home
787 Kings Street
Port Chester, New York 10573
(914) 937-5800

PLEASE BE ADVISED:

THAT, a hearing shall be afforded the above named residential health care facility, to show why the revision of the rate of reimbursement, as shown in the audit reports for the years 1970 - 1973, and the Determination of the Bureau of the Audit Appeals, PNH-251 dated December 13, 1979 should not take place.

THAT, the hearing shall be heard on June 2, 3, 4, 1982 at 10:00 a.m. of that day at 8 East 40th Street (3rd floor), New York, New York and at such other adjourned dates, times and places as the Administrative Law Judge may deem necessary.

THAT, the jurisdictional basis for said hearing is Section 2803 of the Public Health Law, of the State of New York §86-2.7, Chapter II, Title 10 of the

Codes, Rules and Regulations of the State of New York, and the procedures used shall be as directed and as may be applicable, pursuant to Section 86-2.7 of New York Codes, Rules and Regulations, Section 12-a of the New York State Public Health Law and the State Administrative Procedure Act.

A stenographic record of this proceeding shall be made.

The residential health care facility shall appear in the person of its counsel and/or operators, or administrators; produce witnesses and such evidence as may be desired on its part, and cross-examine witnesses and examine such evidence as may be produced by the New York State Department of Health.

THAT, pursuant to 10 NYCRR §86-2.7(f)(3) the burden of proof at said hearing shall be upon the residential health care facility.

THAT, the facility shall file a confirmation that it will be prepared to go forward on the above-noted scheduled hearing day. Said confirmation shall be sent to Synnova H. Gooding, Esq., New York State Department of Health, Office of Health Systems Management, Empire State Plaza, Tower Building, 25th Floor, Albany, New York, 12237, seven (7) days prior to said hearing date.

THAT, in the event that the facility fails to go forward with its evidence on the scheduled hearing date the request or order for said hearing shall be deemed to have been waived.

THAT, the hearing shall be limited to the following issues:

KING STREET NURSING HOME
PNH-251
(1970, 1971, 1972, 1973)

1. Whether architect fees of $2,100. and $630., related to renovation of the facility's basement apartment in 1970 are allowable for reimbursement purposes. (Audit adjustments #1a, 8b, 1970; Bureau Determination, Item 1; HIM-15 § 2102.3).
2. Whether $13,805. in costs for the renovation of the basement apartment in 1970 should be added to the basis for purposes of calculating the return on capital and allowed for reimbursement purposes. (Audit adjustment equity adjustment #2f, 1970; Bureau Determination Item 1; HIM-15 § § 100, 2304).
3. Whether the following amounts, paid to the operator and to members of his family, are allowable for reimbursement purposes. (Audit adjustments #1b, 11, 1970; #8, 1971; #8, 9, 1972; #13, 1973; Bureau Determination Item 2; 10 NYCRR §86.27b, Currently 86-2.25b; HIM-15 § 2300).
   a. Payment of $7,000. for legal fees to operator, exceeding the maximum allowance in 1970.
   b. Payments in excess of maximum allowance to:

R. Wilner(son):	1970	1971	1972	1973
	$4,245.	$5,010.	$5,662.	$5,662.
S. Fuchs(sister):	1970	1971	1972	1973
	$1,330.	$3,100.	$2,400.	$2,400.
B. Wilner(wife):	1970	1971	1972	1973
	$1,000.	$1,000.		

4a. Whether automobile expenses in excess of the $1,500 annual allowance based on reasonable mileage should be allowed for reimbursement purposes.
(Audit adjustments #2g, 9a, 1971; #1, property adjustment 2a, 1972; #3, property adjustment 1a, 1973; Bureau Determination Item 3; HIM-15 §2102.3).

Expenses:	1971	1972	1973
	$428.	$182.	$33.
Depreciation:	1971	1972	1973
	$620.	$1,129.	$900.

4b. Whether prepaid automobile expense and the net book value of the automobile should be added to equity for 1971, 1972 and 1973. (Audit equity adjustments #2b, 3d, 1971; #2a, 2d, 1972; #2a, 2d, 1973; Bureau Determination Item 3; HIM-15 §2102.3).

5. Whether certain undocumented expenses are allowable for reimbursement purposes. (Audit adjustments #3a, 3b, 6, 8c, 8e, 1970; #2d, 2f, 2h, 1971; #3a, 3b, 3c, 3d, 3e, 3g, 3h, 1972; #4a, 4b2, 4b3, 4c, 11a, 1973; Bureau Determination Item 4; HIM-15 § § 2102.3, 2300, 2304).

a. Payments to the Sheraton Motor Lodge in the amounts of $95., $103. and $60. in 1970.
b. Payments to "Washington Arms" totaling $129. in 1970.
c. Payments to the Terrace Hotel of $50. in 1970.
d. Payments to Lou Siegal totalling $37. in 1970.
e. Payments to "Claim Box" of $12. in 1970 and $60. in 1971.
f. Payment to "Seminar" of $23. in 1970.

g. Payment for unknown purpose of $117. in 1970.

h. Payment to the Fine Arts Paper Company of $192. in 1970.

i. Payments to the Interstate Lumber and Mill Corporation and for power saw rental of $147. in 1970.

j. Payment to Harold F. Cambell of $225. in 1970.

k. Payment to Kerslake Bros. Tree Service of $175. in 1970.

l. Payments for trips to Albany of $302. in 1971 and $75. in 1972.

m. Payments for undocumented travel and entertainment of $133. in 1971.

n. Payment for a trip to Aruba of $364. in 1972.

o. Payment to Advanced Management Research of $375. in 1972.

p. Payments for a trip to Japan totalling $3,252. in 1972.

q. Payments of $36. to the Hotel Biltmore and $21. to "Diners" in 1972.

r. Payments in excess of dues to the Westchester County Nursing Home Association of $40. in 1972 and $51. in 1973.

s. Payments to the Westchester County Nursing Home Association for dinner tickets in the amounts of $80. in 1972 and $177. in 1973.

t. Payment for "entertainment" of $29. in 1972, and $832. in 1973.

u. Payments for miscellaneous expenses: National Report, Inc., $200., N.Y. State Department of Transportation, $113., parking violation tickets, $19.; American Express dues, $15.; Ryetown Hilton Inn, $192.; Clam Box, $22.; Sawpit, $29.; Ciro's Restaurant, $39.; Traveler's, $16.; Marianacci's, $25.; petty cash, $9.; for a total of $679. in 1973.

v. Payment to A. Costa of $220. in 1973.

6. Whether certain telephone expenses are allowable for reimbursement purposes (Audit adjustments #4a, 1970; 1b, 1971; #2a, b, 1973; Bureau Determination Item 5; HIM-15 § § 2102.3, §2300, 2304).

1970	1971	1972	1973
$898.	$938.	$982.	$1,273.
			$182.

7. Whether "yellow page" directory advertizing is allowable for reimbursement purposes. (Audit adjustments #4b, 1970; #1a, 2a, 1971; #2b, 1972; #2c, 1973; Bureau Determination Item 6; HIM-15 § § 2136.2, 2300).

1970	1971	1972	1973
$437.	$99.	$329.	$329.
	$253.		

8. Whether contributions to organizations are allowable for reimbursement purposes (Audit adjustments #4c, 1970; #2b, 2i, 1971; #3f, 1972, #4b1, 1973; Bureau Determination Item 7; HIM-15 §2102.3).

1970	1971	1972	1973
$90.	$65.	$10.	$120.
	$30.		

9. Whether $680. in franchise tax expense for 1970, is allowable for reimbursement purposes. (Audit adjustment #4d, 1970; Bureau Determination 8; 10 NYCRR § §86.8, currently 86-2.7, 86.22 currently 86-2.18, HIM-15 §2122.2(b)), §2122.4(c).

10. Whether profit on sales to the provider by a related company (Rubber Utilities, Inc.) is allowable for reimbursement purposes. (Audit adjustments #5, 8d, 10, 1970; #3, 1971; #4, 7c, 1972; #6, 8, 9, 11d, 1973; Bureau Determination Item 9; 10 NYCRR 86.28, currently 86-2.26; HIM-15 #1004.3).

1970	1971	1972	1973
$686.	$1,692.	$1,662.	$1,978.
$116.		$445.	$208.
$92.			$92.
			$73.

11. Whether payments for lawn maintenance at the operator's personal residence are allowable for reimbursement purposes. (Audit adjustments #7, 9, 1970; #4, 5, 1971; #6, 7b, 1972; #10, 1973; Bureau Determination Item 10; HIM-15 §§906.1, 2102.3, 2103).

1970	1971	1972	1973
$82.	$83.	$536.	$709.
$485.	$668.	$166.	

12a. Whether the useful lives assigned to movable equipment should be reduced from 10 years to 5 years in 1970, 1970, 1971, 1972 and 1973, and whether corresponding adjustments should be made to equity adjustment §8a, 12b(1), 12(b)(2); equity adjustment #3, 1970; #6a, 7, 9b, 9c, equity adjustment #3, 1971; #5, property adjustments #2b, 2c, equity adjustment #3, 1972; #11c, property adjustment #1b, equity adjustment #3a, 1973; Bureau Determination Item 11; HIM-15, §§104.17, 108.2).

12b. Whether leasehold improvements of $2,501. in 1970; $718. in 1971; and $685. in 1972 should have been capitalized; whether the

useful lives assigned to these improvements should have been revised to take into consideration the remaining life of the building; and whether corresponding adjustments should have been made to equity. (Audit adjustments #8a, 1970; #6b, 1971; #7a, 1972; Bureau Determination Item 11; HIM-15, §104.17, 108.2).

13. Whether $330. for a television set purchased in 1970, is allowable for reimbursement purposes. (Audit adjustment #8f, 1970; Bureau Determination Item 12, HIM-15 §2106.1).

14. Whether $21,154. should be removed from equity for 1971. (Audit equity adjustment #2c, 1971; Bureau Determination Item 14; HIM-15 §1218.2).

15. Whether $11,000 in accrued wages payable to the Operator should be included in equity for 1970. (Audit equity adjustment #2g, 1970; Bureau Determination Item 15; HIM-15 §1218.1).

16. Whether an adjustment to statistics should be made based on audited patient days. (Audit adjustments to statistics, 1970, 1971, 1972, 1973; Bureau Determination Item 16, HIM-15 §2304).

1970	1971	1972	1973
+ 114	+ 29	+ 100	+ 304

17. Whether payments to the Internal Revenue Service for late filing of tax returns in the amount of $185. in 1973 is allowable for reimbursement purposes. (Audit adjustment #1, 1973; Bureau Determination Item 18; HIM-15, §2122.1).

18. Whether $324. in food expense billed to the Operator's son in 1973 is allowable for reimbursement purposes. (Audit adjustment #5, 1973; Bureau Determination Item 19; HIM-15 §§2102.3, 2300).
19. Whether $275. in payment to a dietary consultant in 1973 is allowable for reimbursement purposes. (Audit adjustment #7, 1973; Bureau Determination Item 20; HIM-15 §§2102.3, 2300).
20. Add Issue #21 Bureau Review.

DATED: Albany, New York
May 4, 1982

ROBERT M. CRANE, Director
Office of Health Systems Management

By: Peter J. Millock
PETER J. MILLOCK, General Counsel
New York State Department of Health

Inquires to: Synnova H. Gooding, Esq.
Telephone No: (518) 473-5174

Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

1985 Term

No. 85-1501

IN THE MATTER OF THE APPLICATION

OF

CORTLANDT NURSING HOME, HIGHLAND NURSING HOME INC., and KING STREET HOME, INC.,

Petitioners,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; C. MARK LAWTON, as Director of the Budget of the State of New York; and DONALD KITCHEN, as Commissioner of Social Services of St. Lawrence County,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Brief for State Respondents in Opposition

ROBERT ABRAMS
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ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
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CLIFFORD A. ROYAEL
Principal Attorney
Of Counsel

Dated: April 14, 1986

Question Presented.

Has a constitutional question been drawn into issue with respect to the decision of the New York Court of Appeals that (1) in the case of *Cortlandt Nursing Home*, there has not been unreasonable administrative delay within the meaning of section 301(1) of the State Administrative Procedure Act and that (2) in the cases of *Highland Nursing Home* and *King Street Home*, it could not consider whether there has been unreasonable delay because the administrative hearings have not been concluded and, therefore, directed that such hearings be held.

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IN THE

SUPREME COURT OF THE UNITED STATES

1985 TERM

No. 85-1501

IN THE MATTER

OF

The Application of CORTLANDT NURSING HOME, HIGHLAND NURSING HOME, INC., and KING STREET HOME, INC.,

Petitioners,

against

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York; BARBARA BLUM, as Commissioner of Social Services of the State of New York; C. MARK LAWTON, as Director of the Budget of the State of New York; and DONALD KITCHEN, as Commissioner of Social Services of St. Lawrence County,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

Brief for State Respondents in Opposition.

Statement of the Case.

The State respondents supplement petitioners' statement of the case in the following respects.

1. *The Facts*

As the Court of Appeals described (Pet App 14),[1] under the State's Medicaid rate making methodology, petitioners' fiscal and statistical reports, upon which their prospective Medicaid rates were calculated, were subject to audit for a period of six years after filing. State Health Department regulation 10 NYCRR 86-2.7 formerly 86.8. At the completion of the audit, petitioners were afforded a closing conference, at which time they could produce additional documentation in support of their positions. 10 NYCRR 86-2.7(e). Thereafter, they could initiate a bureau review of the audit to challenge specific items of the audit, and within 30 days of receipt of the bureau review determination, they could request an administrative hearing (Pet App 6). 10 NYCRR 86-2.7(b) and (e). Pursuant to the regulations, "* * * petitioners are charged with the knowledge that any rate of payment will be construed to represent a provisional rate until an audit is performed and completed * * *" (Pet App 13). The facts with respect to each petitioner are set forth in the decision of the New York Court of Appeals (Pet App 7-10).

2. *The Proceedings*

The petitioners commenced separate proceedings pursuant to article 78 of the New York Civil Practice Law and Rules seeking judgments enjoining the respondents from

[1]Refers to the appendix attached to the petition.

recovering or attempting to recover Medicaid overpayments determined after audits (Pet App 44, 66, 86). In the case of *Cortlandt Nursing Home* (hereafter "*Cortlandt*"), an administrative hearing had been concluded and the State Commissioner of Health had issued a final order upholding audit disallowances (Pet App 47, 56). In the cases of *Highland Nursing Home* and *King Street Home* (hereinafter "*Highland*" and "*King Street*"), administrative hearings had not been concluded (Pet App 69, 89).

In each case, the petitioners alleged in their separate petitions that recoupment is barred by the six-year statute of limitations set forth in section 213 of the New York Civil Practice Law and Rules (Pet App 47, 69, 90). Additionally, the petitioners in *Cortlandt* and *King Street* alleged that recoupment was barred by the laches of the State respondents (Pet App 47, 90).[2] The petitioners did not allege that they have been prejudiced by or that their due process rights have been violated by administrative delay caused by the respondents. These cases have been decided upon State law issues.

The Appellate Division of the State Supreme Court rejected the lower court's holding that the administrative

[2]*Highland* also alleged, but did not subsequently argue in the State courts, that respondents have recouped and continue to recoup money without affording it "* * * its due process right to a hearing" (Pet App 70). The Court of Appeals noted with respect to such hearing,

> "[a]lthough no hearing has been held, it has been noted by respondents (Verified Answer, para 13), and has not been rebutted by petitioners, that any failure to conduct a hearing in accordance with the order of the Appellate Division has been upon the mutual consent of the involved parties" (Pet App 8-9).

proceedings here were barred by the State statute of limitations. However, it held that respondents were properly enjoined from recoupment or attempted recoupment by section 301(1) of the State Administrative Procedure Act, which requires that parties to an adjudicatory proceeding "* * * shall be afforded an opportunity for hearing within reasonable time". Based upon its view of State public policy as set forth in *Solnick v. Whalen,* 49 NY2d 224, 232 (1980), the Appellate Division concluded that it is not reasonable "* * * to permit a 10-year delay in reaching a determination by an administrative agency which provides finality to a reimbursement rate" (Pet App 38, 39).

The Court of Appeals, in its decision reversing and modifying the Appellate Division's orders in these cases, also noted that the critical issue here is whether "* * * delay in adjudicating the final rate of Medicaid reimbursement violated the directive of the State Administrative Procedure Act that hearings be conducted within a reasonable time" (Pet App 5). It rejected the petitioners' contentions that the passage of time, standing alone, provided a basis in the circumstances presented here for enjoining recoupment or attempted recoupment. It stated that an administrative agency in the first instance and the judiciary sitting in review must apply a balancing test, considering several factors,[3] to determine whether a period of delay is reasonable within the meaning of the State Administrative Procedure Act (Pet App 13).

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[3]They include, "(1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation" (Pet App 13).

However, the Court of Appeals held that it could not consider the reasonableness of administrative delay in *Highland* and *King Street* because the administrative hearings have not been concluded (Pet App 17). It observed that, "* * * absent extraordinary circumstances, a court may not intervene in an administrative proceeding, for reason of adjudicatory delay, until a hearing has been held and an official order rendered" (Pet App 16). Thus, the Court of Appeals was limited, under State procedure, to granting mandamus to compel a hearing in those cases (Pet App 17). It noted that it was within the province of the administrative agency, in the first instance, to determine whether there has been substantial prejudice to a facility resulting from administrative delay (Pet App 16).

The Court of Appeals considered the issue of administrative delay in *Cortlandt* because in that case the administrative hearing had been concluded. Based upon the record, it could not say that there had been unreasonable delay within the meaning of the State Administrative Procedure Act (Pet App 19). It noted that petitioner neither demonstrated the manner by which administrative delay had handicapped its defense efforts at the administrative hearing nor contended that administrative delay had precluded expansion of services or caused curtailment of existing services (Pet App 18). The Court of Appeals did not discuss or decide any constitutional issues.

REASONS FOR DENYING THE WRIT

1. No constitutional question has been drawn into issue.

It is clear from reading the petitions and decisions in these cases that they have been argued and decided on the basis of State law. Initially, the State Supreme Court held

that the respondents were barred from recouping or attempting to recoup Medicaid overpayments pursuant to the six-year statute of limitations set forth in section 213 of the State Civil Practice Law and Rules (Pet App 43, 64, 85).

Although the Appellate Division of the State Supreme Court rejected this reasoning, it nevertheless affirmed the injunctions granted by the State Supreme Court relying on the provision of section 301(1) of the State Administrative Procedure Act, which requires that an adjudicatory hearing must be held "within reasonable time" (Pet App 38). It did not discuss any constitutional issues, and the petitioners did not raise any. They had argued that the respondents were barred by the six-year statute of limitations and that, in any event, the State should not be "* * * permitted to accomplish administratively what it would be barred from doing in the civil context of the judicial process" (Pet App 37, 38).

The petitioners' contention (Pet 9, n 3) that a due process issue was raised and preserved below is simply not supported. Their reference to the Appellate Division decision (Pet App 37) as evidence that a due process claim had been made is plainly wrong. The Appellate Division noted only that respondents had stated, in discussing when a cause of action would accrue under the statute of limitations, that "* * * a Medicaid provider must be afforded due process through an administrative hearing when the Commissioner seeks to recoup purported overpayments" (Pet App 37). This hardly constituted the discussion of the merits of the constitutional issue sought to be argued here by the petitioners that mere delay denies them due process.

Nor did the petitioners raise any constitutional issues in the New York Court of Appeals. The "summary" in petitioners' brief made two fleeting references to "due process" without reference to the federal Constitution or cases relying on the federal Constitution.[4] The Court of Appeals did not address or allude to this so-called issue. Moreover, even if the petitioners had made extensive due process arguments based upon the federal Constitution, the Court of Appeals would not have considered them. That Court has stated that it will not consider constitutional theories that were not argued in the Appellate Division, even if they were alleged in the complaint. *Matter of Barbara C.*, 64 NY2d 866 (1985); *Matter of Eagle v. Patterson*, 57 NY2d 831 (1982); *Barbara v. Dembroski*, 54 NY2d 648 (1981); *Cibro Petroleum Products, Inc. v. Chu*, ____ NY2d ____ (decided March 20, 1986). Since petitioners did not raise any constitutional arguments in the Appellate Divison, they were precluded from raising them in the Court of Appeals.

It is well settled that this Court has jurisdiction to review the final judgment of a State court "* * * only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 US 493, 496-497 (1981). Where the State's highest court has failed to pass upon a federal question, it is assumed, unless the petitioners show the contrary, that the omission was due to want of proper presentation of such issue in the State court. *Id.* at 495. Here, petitioners point to nothing in the record which shows that the State courts were afforded an opportunity to pass upon the question of federal constitutional law which they now belatedly raise. *Id.* at 499. Ac-

[4]Pages 32 and 33 of petitioners' brief in the New York Court of Appeals are annexed hereto.

cordingly, we respectfully submit that this Court does not have jurisdiction to consider the federal issue.

2. Administrative delay standing alone does not under the circumstances presented here violate petitioners' right to due process of law.

In any event, there is no merit to petitioners' contention that their right to due process of law has been violated by the mere passage of time between the dates they were paid under the Medicaid program and audit proceedings were either finally concluded or hearings noticed. The petitioners had not alleged that they were prejudiced by delay or who had caused delay. As the New York Court of Appeals observed, Cortlandt, whose hearing had been finally concluded, had not demonstrated how administrative delay had handicapped its defense at the administrative hearing or precluded expansion of services or caused curtailment of existing services (Pet App 18).

This Court has had occasion to hold that it would be unwarranted for courts to intervene in administrative proceedings based upon administrative delay alone. *INS v. Miranda*, 459 US 14, 18 (1982); *Heckler v. Day*, ____ US ____, 104 S Ct 2249, 2258 (1984). In *Wright v. Califano*, 587 F2d 345 (7th Cir 1978), that court specifically considered whether administrative delay standing alone violated due process. Citing this Court's decisions in *Fusari v. Steinberg*, 419 US 379, 389 (1975), and *Flemming v. Nestor*, 363 US 603 (1960), it concluded that there was no due process violation because the "* * * record does not establish that the delays are arbitrary or the result of some other inexcusable circumstance." 587 F2d at 354.

Petitioners' challenge in this case based upon the passage of time alone amounts to an attack on the methodology by which their Medicaid rates were determined and paid. Under that methodology, audits could be initiated by respondents for up to six years after the fiscal and statistical reports of the provider had been filed. However, they did not challenge, at the time they accepted payment, the right of respondents to audit them subsequently, and, we respectfully urge, that they cannot now do so under the guise of a due process challenge.

Petitioners have pointed to no case law which supports the proposition that they have been denied due process of law by the mere passage of time in concluding audit proceedings. Nor do they offer any reason why the procedural safeguards described by the New York Court of Appeals are insufficient to protect them against substantial prejudice resulting from administrative delay. Accordingly, we do not believe that this case presents a question which warrants consideration by this Court.

3. There is no final State court judgment in *Highland* and *King Street*.

The New York Court of Appeals has treated *Highland* and *King Street* as proceedings in the nature of mandamus and directed that respondents hold hearings in accordance with its decision (Pet App 21). In those hearings, it will be within the province of the administrative agency, in the first instance, to determine the cause of delay and whether substantial prejudice has resulted to the facility from administrative delay (Pet App 16). If administrative delay has significantly and irreparably handicapped either facility in mounting a defense, the administrative agency, or a court reviewing a final administrative order, is authorized to dismiss the proceeding (Pet App 17).

Clearly, the judgments directing that respondents hold hearings in *Highland* and *King Street* are not final judgments within the meaning of 28 USC § 1257. Any issues raised by the petitioners with respect to administrative delay may be mooted by such proceedings or at least the records sufficiently developed so that such issues may properly be considered by a reviewing court. *Minnick v. California Dept. of Corrections*, 452 US 105, 123 (1981).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
April 14, 1986

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for State
Respondents

ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

CLIFFORD A. ROYAEL
Principal Attorney

Of Counsel

APPENDIX.

(32) and prejudicial. They make a mockery of administrative "due process" and the "reasonable time" constraints placed on administrative hearings by §301 of SAPA. Moreover, these delays are not just isolated instances, but the latest in a line of cases by one particular administrative agency, as reflected by the numerous lower court opinions cited.

It is time for the highest court of this State to send a message to that agency that such gross bureaucratic inefficiency will no longer be tolerated, and that officials of government, although possessed of great administrative powers and subject to only limited judicial review, are not completely free to abuse those powers, especially in the context of "quasi-adjudicatory" proceedings.

The lower courts are obviously painfully aware of the magnitude of the problem, but they clearly need the imprimatur of the Court of Appeals to help them curb such abuse. Petitioners here are not asking this Court to divest administrative agencies of jurisdiction every time a delay occurs, but surely there comes a point in time when unexcused protracted delay becomes so extreme that administrative agencies' assertions of continuing jurisdiction become ridiculous.

It will surely offend the public's perception of justice if the state can cry "delay" and thereby foreclose a party's review of its actions unless initiated within four months (*Solnick v. Whalen*, 49 NY2d 224), and then turn around (33) over a decade later and assert claims of the very same nature arising out of the same time period.

Nevertheless, the inexorable logic of Appellants' arguments is that as long as a particular case falls within

an agency's general area of jurisdiction, even if the case were one hundred years old, an agency could still hold a hearing, and the courts would be powerless to intervene until after the matter were to come before them in a "certiorari" type proceeding. Appellants take advantage of dictum in one of this Court's recent decisions involving a delay of seven and one-half months (*Matter of Geary v. Commissioner of Motor Vehicles*, 59 NY2d 950 [1983]), as support for this general proposition. The absurdity of such an argument is exceeded only by the complete disdain it shows for "administrative due process," not to mention the waste of resources—both public and private.

This Court should exercise its powers to enforce the mandate of §301(1) of SAPA, clarifying and limiting the scope of *Geary, supra.* There must come a point in time when bureaucratic "delay" becomes so clearly "inordinate" (as in the present cases), that "due process" as well as SAPA requires divesting an administrative agency of further jurisdiction in adjudicatory type proceedings.